(2) Supreme Court, U.S.
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No. 05-367 SEP 16 2005

In The
Supreme Court of the United States

JOSEPH R. ANDERER, JR.,
Petitioner,

v.

POLICE CHIEF ARTHUR JONES, ET AL.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether a suspect's refusal to respond to potentially incriminating and compelled inquiry in a criminal investigation can be used to elevate reasonable suspicion to probable cause under the Fifth Amendment's privilege against self-incrimination?

When investigating police officers are confronted with a completely unreliable witness whose statement is insufficient to form probable cause, does the Fourth Amendment right to be secure against unreasonable search and seizures require the investigating police officers to investigate further?

PARTIES TO PROCEEDING

The petitioner is Joseph R. Anderer, Jr.,

The respondents are Police Chief Arthur L. Jones, Deputy Inspector Charles R. Grisham, Lt. Detective Mary Hoerig, Detective Mercedes Cowan, and City of Milwaukee.

RULE 29.6 STATEMENT

Joseph R. Anderer, Jr. is the full name of the petitioner. Anderer is an individual and not a corporation, as was identified in the disclosure statement filed with the Seventh Circuit Court of Appeals on October 22, 2002 in Appellate Court No. 02-3669.

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OPINIONS BELOW FOR WRIT OF CERTIORARI

The opinion of the United States Court of Appeals for the Seventh Circuit is published at 385 F.3d 1043 (7th Cir. 2004). This opinion was amended on denial of rehearing on June 21, 2005 as published at 412 F.3d 794 (7th Cir. 2005). Petition for Rehearing and Rehearing En Banc was denied on June 21, 2005 and published at 412 F.3d 794 (7th Cir. 2005). The order of the United States District Court for the Eastern District of Wisconsin granting defendants' motion for summary judgment on September 30, 2002 is published at 342 F.Supp.2d 799 (E.D. Wis. 2002). The October 24, 2001 Decision of the Board of Fire and Police Commissioners of the City of Milwaukee on Motion to Hear and Rule on Pending § 1983 Constitutional Claims is an unpublished document. All opinions and orders are reproduced in the appendix to this petition.

STATEMENT ON THE BASIS FOR JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its opinion on October 6, 2004, and its opinion amending their October 6, 2004 opinion and denying the petition for rehearing and rehearing en banc was entered on June 21, 2005. (App. at 1, 95). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. amend. IV.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when an actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. CONST. amend V.

Every person who, under color or any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act or Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. 42 U.S.C. § 1983.

STATEMENT OF THE CASE

On April 17, 2001, a juvenile ("J.R."), together with three other juveniles were arrested for burglary of a boat at the Pump House Marina on Milwaukee's south side. (App. 22-24). Three of the four juveniles were taken into custody by Officers Logan and Cook and transported to the second precinct police station in Officers Logan and Cook's squad. (Id., at 24). The fourth juvenile, J.R., was escorted by petitioner ("Anderer") to his squad car. (Id., at 24). In doing so, Anderer positioned J.R. in his squad and then proceeded to the second precinct. (Id., at 24-25). Anderer's transport of J.R. from the Pump House Marina to the second precinct took two minutes and two seconds. (Id., at 25).

When J.R. was removed from Anderer's squad at the second precinct by Officer Cook there was blood dripping from J.R.'s nose onto his chin. (Id.) Sergeant Jones, the supervising officer in charge of the seven police officers involved in the apprehension of the four juvenile burglars at the Pump House Marina, approached J.R. and asked him why he was bleeding. (Id., at 23-25). J.R. while laughing and joking with the three other juveniles pointed at Anderer and said, "That officer hit me," and then pointed at Officer Cook and said, "That officer raped me." (Id., at 25, 47 at n.13). Upon further questioning, J.R. claimed that Anderer, "hit [him] when he put [him] in the [squad] car." (Id., at 25).

Sergeant Jones then asked Anderer how J.R. got the bloody nose, to which Anderer responded, "How would I know . . . I just transported him." (Id., at 2). J.R. in a written complaint with Sergeant Jones then explained that, "He said something to [Anderer]," who "told him 'don't get smart' and [then] hit him one time [on] the mouth and nose [and] g[ave] him a bloody nose and bloody lip." (Id., at 25).

Detectives William Smith and Michelle Harrison from the Milwaukee Police Department ("MPD") Internal Affairs Division ("IAD") were dispatched to the second precinct to investigate J.R.'s complaint. (Record 26, Hoerig Aff., Ex. 1001, at p. 5). Detective Smith interviewed J.R. who explained that Anderer placed him in Anderer's squad but did not close the door. (App. 3). J.R. then explained that Anderer asked him what Officer Cook did to him. (Id.) According to J.R., he told Anderer that Officer Cook had nudged his buttocks with a flashlight to which Anderer yelled at him and said he shouldn't be making up "bullshit lies." (Id.) J.R. next stated that he got smart with Anderer, and then ignored Anderer by looking away, and when he turned back to face Anderer, that was when Anderer struck him in the face causing his nose and mouth to start bleeding. (Id.) J.R. also added that during transport to the second precinct Anderer yelled at him by saying, "Do you understand me?", stopped the squad, got out of the squad, opened J.R.'s door, and said he was going to "whip [J.R.'s] ass." (Id., at 3, 69-70). J.R. further added that he was unsure if anyone witnessed this because he and Anderer were alone in the squad. (Id.)

Detective Harrison interviewed Sergeant Jones who explained that after the juveniles were apprehended, he spoke with a citizen witness to the burglary, but overheard the juveniles using profanities and giving Officers Cook and Logan a hard time. (Record 26, Hoerig Aff., Ex. 1001 at 17-18). Sergeant Jones further indicated he did not observe any of the juveniles being placed into squads for conveyance, but there was no evidence of fighting or injuries regarding the juveniles at the scene. (Id., at 18). In addition, Sergeant Jones confirmed J.R. was now saying that Anderer hit him while placing him in the squad, but did not make any complaint about being hit by a police officer at the scene. (Id., at 18-19). Sergeant Jones also stated he was on the scene for five to ten minutes after the squads left with the juveniles for the

second precinct as he was speaking with a citizen witness. (Id., at 18).

While Detectives Smith and Harrison were conducting their investigation of J.R.'s battery complaint, Officer Cook contacted J.R.'s mother to inform her that J.R. had been arrested. (App. 3). J.R.'s mother admitted she was not surprised J.R. was arrested for burglary and that J.R. was taking several prescription medications two of which Cook recognized to help control a person's mental state. (Id.) J.R.'s mother then told Cook that J.R. had not taken his medication that day and needed to be released from custody as soon as possible. (Id.) Cook then informed Detectives Smith and Harrison of his contact with J.R.'s mother and that J.R.'s mother had informed him that J.R. was on a variety of drugs which he had not taken all day and should be released as soon as possible. (Id., at 3-4).

At about 10:05 p.m., MPD Identification Technician Brown appeared at the second precinct at the request of Detective Smith to take pictures of J.R. (Record 62, Brown Aff., at pp. 1, 5). Detective Smith then directed Brown to take four pictures of J.R. which included an overall picture of J.R. from head to ankle, a picture of J.R.'s pants, a picture of J.R.'s shirt, and a close up of J.R.'s face with J.R. pulling down his lower lip to show the inside of his lower mouth. (Id., at p. 7). Detective Smith then reported that J.R. appeared to have sustained a laceration to his upper and lower lips and there was dried blood on his pants and shirt. (Record 26, Hoerig Aff., Ex. 1001 at p. 8).

Then at about 10:45 p.m., Detectives Smith and Harrison tried to interview Officers Logan and Cook, but both officers declined to be interviewed without union representation. (Id.) Nonetheless, these detectives were able to interview Officer Shoman at about 10:55 p.m. (Id., at p. 19). In conducting this interview, it was learned that Shoman responded to the boat burglary and when she arrived, four

juveniles were in custody. (Id., at p. 20). Shoman immediately recognized three out of the four juveniles, as they hung out in her squad area. (Id.) In addition, Shoman stated all three of the juveniles that she knew had smart mouths and she was not surprised to see them involved in a boat burglary. (Id.) Shoman then indicated she observed J.R. in the back of Anderer's squad and she did not observe any type of physical confrontation between J.R. and Anderer, nor did she observe any blood or injury on J.R. (Id.)

Then at 11:20 p.m., Detectives Smith and Harrison informed Anderer he was the target of a criminal investigation and requested that he make a statement. (Id., at p. 8). Anderer refused to give any statement without union representation. (Id.) At that point, Detective Harrison informed Anderer they were going to get a sergeant to provide him with a PI-21 form used to compel statements from MPD members in internal rules investigations. (Record 61, Anderer Aff., at ¶ 73-74). After a few moments of silence, Anderer asked Detective Harrison, ". . . what did the kid accuse me of hitting him with?" (Id., at ¶ 75). Harrison responded that is what didn't make any sense as J.R. accused Anderer of punching him with the back of his hand, but J.R. had no injuries other than a small cut that you could barely see on the inside of his lip which was not consistent with a punch. (Id., at ¶ 76). Anderer then gave Detective Harrison the names, phone numbers and addresses of two citizen witnesses who watched him place J.R. into his squad and stated that these witnesses could tell her that he did not hit J.R. (Id., at ¶ 77). Anderer then observed Detective Harrison write down the names, addresses and phone numbers of the citizen witnesses in her memo book. (Id., at ¶ 78).

Anderer then asked Detective Harrison if they were going to investigate J.R.'s accusations against Officer Cook for raping him to which Harrison responded that they knew those accusations were a lie and that Anderer was the only target of the investigation. (Id., at ¶ 79). Anderer then

responded to Detective Harrison that he was 200 pounds and that if he punched J.R., there would have been some bruising or swelling on J.R.'s face and he would have some cuts or redness on his own hands, and then requested that the detectives get J.R. medically cleared to remove any question of the alleged punching. (Id., at ¶ 80). At that point, Detective Harrison inspected Anderer's hands and told Anderer that she knew J.R.'s complaint was b.s. (Id., at ¶ 81). Detective Harrison then noted in her report that she observed Anderer's hands and it did not appear there were any injuries to his hands. (Record 26, Hoerig Aff., Ex. 1001, at p. 9).

A few moments later, Lieutenant Hoerig and Detective Cowan of the MPD IAD arrived at the second precinct to investigate J.R.'s alleged battery by Anderer. (Record 61, Anderer Aff., at 84-89; Record 26, Hoerig Aff., Ex. 1001, at p. 9). This caused Detective Harrison to leave Detective Smith with Anderer to find out why Lt. Hoerig and Detective Cowan were there. (Record 61, Anderer Aff., at ¶ 89-90). A few moments later, Detective Harrison returned and told Anderer, "This does not look good, this is going south." (Id., at ¶ 90).

Within a few minutes, Detective Cowan and Lt. Hoerig entered the room with Anderer and requested Anderer's memo book which he surrendered. (Id., at ¶ 95). Detective Cowan left and moments later came back with two copies of entries from Anderer's memo book containing the names, phone numbers and addresses of the two citizen witnesses that witnessed Anderer placing J.R. into his squad car at the Pump House Marina. (Id., at ¶ 96). Additionally, Detective Cowan pulled out her high powered flashlight and examined Anderer's hands from all angles and stated, "You don't need a photo tech." (Id., at ¶ 98).

A few moments later, Inspector Grisham entered the captain's office and informed Anderer he was being placed under arrest for physical abuse of a child and suspended his

police powers until this matter was investigated. (Id., at ¶ 101-102). The arrest occurred at about 12:35 a.m. on April 18, 2001 at which time Anderer was conveyed to the Milwaukee County Criminal Justice Facility for processing. (Record 26, Hoerig Aff., Ex. 1001, at p. 9). Prior to Anderer's arrest, Lt. Hoerig determined there was probable cause to arrest Anderer and recommended to Chief Jones that Anderer be arrested for child abuse because:

> (a) J.R. was twelve years old;
>
> (b) J.R. was not injured at the time he was turned over to Officer Anderer to be conveyed to the second district station in Anderer's squad;
>
> (c) J.R. was in Anderer's custody exclusively while conveyed to the second district station;
>
> (d) J.R. was handcuffed in the back of Anderer's squad when he was conveyed to the second district station;
>
> (e) J.R. had injuries consistent with being hit in the mouth when he arrived at the second district station [sic];
>
> (f) J.R. IDENTIFIED OFFICER ANDERER AS THE POLICE OFFICER THAT HIT HIM IN THE MOUTH;
>
> (g) ANDERER DID NOT EXPLAIN HOW J.R. WAS INJURED;
>
> (h) Anderer did not report use of force involving J.R. or any incident involving J.R., or any injury to J.R.

(App. 30-31).

After Anderer was transported to the Milwaukee County Justice Facility, the MPD IAD detectives compelled Officers Cook and Logan to provide statements and both officers did so. (Record 26, Hoerig Aff., Ex. 1001, at p. 11-15). In addition, at about 1:30 a.m. on April 18, 2001, Identification Technician Kathrein was summoned to the second precinct to take photos of J.R. (Record 63, Kathrein Aff., at p. 5). Kathrein then took ten Polaroid photographs of J.R. including pictures of J.R. in his hooded zipped up jacket, a picture of J.R.'s face and upper torso with his jacket unzipped, a picture of J.R.'s right pant leg, a picture of J.R.'s lower lip pulled down to show the inside of his lower mouth, a picture of J.R. pulling his upper lip open to show the inside of his upper lip, a picture of J.R. in his hooded jacket zipped shut, a second picture of J.R. pulling down his lower lip, a picture of J.R.'s left shoulder depicting stains on his shirt, a picture of J.R.'s pants showing stains on them, and a picture of J.R.'s shirt showing stains on it. (Id., at p. 7-8).

Anderer was fingerprinted and confined in jail for nearly twelve hours when he was released without bail at about noon on April 18, 2001. (App. 32). At no time was J.R. taken to a hospital for medical clearance by the MPD as was required under state law and MPD rules and regulations. (App. 70-71).

On July 2, 2001, Anderer filed his complaint in the United States District Court for the Eastern District of Wisconsin pursuant to 42 U.S.C. § 1983 against the City of Milwaukee, Police Chief Arthur Jones, Deputy Inspector Charles Grisham, Lt. of Detectives Mary Hoerig and Detective Mercedes Cowan alleging they violated his Fourth and Fourteenth Amendment substantive and procedural due process rights by arresting him on April 18, 2001 without first establishing probable cause. (Record 1). In addition,

Anderer alleged that his First Amendment right was also violated as a direct result of his publicly stating his intentions to sue the defendants for having violated his Fourth and Fourteenth Amendment rights. (Id.) The district court had jurisdiction of this matter pursuant to 28 U.S.C. § 1331. On September 27, 2001, a scheduling order was entered. (Record 13). On October 9, 2001, Anderer filed a motion to compel discovery because the defendants failed to provide mandatory interrogatory disclosures and informed Anderer they were refusing to participate in discovery until the issue of qualified immunity was decided. (Record 15). On October 17, 2001, the defendants filed a motion for summary judgment and submitted affidavits in support of that motion requesting the dismissal of Anderer's complaint, together with filing a motion for a protective order staying discovery on the ground of qualified immunity and other grounds. (Record 20, 27).

On October 24, 2001, Anderer was appealing his termination from Milwaukee Police Department with the Board of Fire and Police Commissioners of the City of Milwaukee and received a decision of board on motion to hear and rule on [Anderer's] pending § 1983 constitutional claims. (App. 128-129). More specifically, the Board of Fire and Police Commissioners of the City of Milwaukee determined they would not hear Anderer's pending § 1983 constitutional claims currently pending in the United States District Court for the Eastern District of Wisconsin in his appeal before the board on his termination from the Milwaukee Police Department. (Id.)

On October 25, 2001, Anderer filed a response in opposition to the defendants' motion for protective order. (Record 36). Anderer then filed a second motion to compel discovery requesting that depositions be taken of Lt. Stack and Detective Harrison on October 31, 2001. (Record 39). Anderer followed this motion by filing a motion for order to obtain law enforcement records and medical records of a

juvenile and submitted an affidavit explaining the relevancy and necessity to obtain those records in order to respond to the defendants' motion for summary judgment on November 16, 2001. (Record 44, 45). On November 21, 2001, defendants filed their brief in opposition to Anderer's motion for order to obtain medical records of juvenile. (Record 47).

On January 2, 2002, a stipulation and order was entered by Judge Lynn Adelman for Judge John W. Reynolds extending the deadline for plaintiff to respond to defendants' motion for summary judgment until the pending discovery motions were decided. (Record 50). On August 1, 2002, Judge J.P. Stadtmueller granted Anderer's motion for order to obtain law enforcement records, but denied Anderer's motion for production of medical/psychiatric records of juvenile and denied Anderer's second motion to compel discovery while granting defendants' motion for protective order to maintain confidentiality of law enforcement records of juveniles and children, together with granting defendants' motion for protective order staying discovery until 14 days after the entry of an order resolving the defendants' motion for summary judgment, thereby denying Anderer's motion to compel. (Record 57).

Anderer filed his brief in opposition to defendants' motion for summary judgment, together with supporting affidavits on September 19, 2002. (Record 59-73). On September 30, 2002, Judge Stadtmueller entered an order granting defendants' motion for summary judgment and entered judgment dismissing plaintiff's case with prejudice. (Record 78, 79). On October 9, 2002, Anderer filed a notice of appeal requesting that the Seventh Circuit Court of Appeals review the final judgment entered on September 30, 2002 dismissing his Complaint, together with a review of Judge Stadtmueller's order of August 1, 2002 granting defendants' motion for protective order denying plaintiff discovery before responding to defendants' motion for summary judgment. (Record 85).

On October 6, 2004, the Seventh Circuit Court of Appeals issued a decision affirming the district court's granting of summary judgment. Anderer v. Jones, 385 F.3d 1043 (7th Cir. 2004), (Coffey, J. dissenting), (amended on denial of rehearing, 412 F.3d 794 (7th Cir. 2005)). (App. 1-94). On October 18, 2004, Anderer filed a petition for rehearing and rehearing en banc and on June 21, 2005, the panel amended its original opinion, but a majority of the active judges did not favor rehearing en banc and the petition was denied. Anderer v. Jones, 412 F.3d 794 (7th Cir. 2005) (Coffey, J. dissenting). (App. 95-113).

Anderer now files with this Court his petition seeking a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

ARGUMENT SUPPORTING ALLOWANCE OF THE WRIT

I. The decision below violates the perimeters of the Fourth and Fifth Amendments to the United States Constitution by approving the Milwaukee Police Department's use of Anderer's refusal to answer questions after being apprised he was a suspect in a criminal investigation as a factor in establishing probable cause for his arrest.

Prior to this decision, the Seventh Circuit had consistently held that police officers "are not relegated to a watered-down version of constitutional rights." Anderer v. Jones, 412 F.3d 794, 795 (7th Cir. 2005) (Coffey, J., dissenting), *citing* Anderer v. Jones, 385 F.3d 1043, 1076 (7th Cir. 2004) (Coffey, J., dissenting) (quoting Driebel v. City of Milwaukee, 298 F.3d 622, 637 (7th Cir. 2002). (App. 95). As such, Anderer was entitled to all constitutional rights afforded to every citizen when J.R. accused him of

unlawfully striking him while taking him into custody. Anderer, 412 F.3d at 798. (App. 101-102).

However, the Seventh Circuit's decision to affirm the district court's finding that Anderer's refusal to answer or speculate as to what caused J.R.'s nosebleed was used as a factor to elevate reasonable suspicion to probable cause for arrest in violation of his Fifth Amendment right. Id. This is because, "[t]he Fifth Amendment to the Constitution states that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.'" Anderer, 412 F.3d at 795, Id. *citing* U.S. CONST. amend. V. (App. 97). The Seventh Circuit has previously interpreted this to mean that law enforcement officers, like every other citizen is protected by the Firth Amendment against self-incrimination preventing "government [from] forc[ing] a person to make a statement, even out of court, that might be used as evidence that he has committed a crime." Id., at 795. (App. 97) (*citing*, Atwell v. Lisle Park Dist., 286 F.3d 987, 990 (7th Cir. 2002). This court has likewise held "that the Fifth Amendment protection against self-incrimination 'must have a broad construction in favor of the right which it was intended to secure.'" (Id., *citing*, Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed. 1118 (1951); *accord* Counselman v. Hitchcock, 142 U.S. 547, 562, 12 S.Ct. 195, 35 L.Ed. 1110 (1892). In addition, this Court has held that as long "as a suspect has an articulated real and appreciable fear that [the information sought might] be used to incriminate him, or 'would furnish a link in a chain of evidence needed to prosecute' him,' the privilege attaches and must be honored." (Id., at 796, citing, Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 124 S.Ct. 2451, 2461, 159 L.Ed.2d 292 (2004) (*citing* Hoffman, 341 U.S. at 486, 71 S.Ct. 814). To this end, there has never been a Supreme Court decision or any case law presented to the Seventh Circuit holding that a suspect's refusal to answer or to provide a statement to investigators in a criminal investigation may be used to elevate reasonable

suspicion to probable cause. Id., *citing* Hiibel, at 2460; Tom v. Voida, 963 F.2d 952, 959 n. 8 (7th Cir. 1992).

More specifically, the district court found "*that J.R.'s statement, by itself may not have been sufficiently reliable or trustworthy to provide a basis for probable cause.*" Anderer, 412 F.3d at 796, *citing* Anderer v. Jones, 342 F.Supp.2d 799, 803 (E.D. Wis. 2002). (emphasis added). (App. 98, 120). Nonetheless, the district court then found there was probable cause for the MPD to have arrested Anderer because J.R. had a bloody nose, Anderer was alone with J.R. in the squad for the two minute, two second transport, and because of Anderer's inability to explain J.R.'s nosebleed. Id., at 796, *citing* Anderer, 342 F.Supp.2d 803-04 (App. 98, 120). The Seventh Circuit then adopted this reasoning of using Anderer's silence against him even after amending its original decision by stating:

> Anderer offered no explanation to the investigating officers for how J.R.'s injuries might otherwise have occurred, and appears only to have inquired about what J.R. claimed Anderer had hit him with. Given these circumstances . . . we believe Milwaukee police officers had probable cause to believe that Anderer had intentionally or recklessly caused J.R.'s bodily injury.

Id., at 797, *citing* Majority Opinion (Revised 12/6/04 at *10). (App. 99-100).

Prior to the Seventh Circuit's holding in Anderer, this Court had held that, "[a] person 'may not be detained . . . without reasonable, objective grounds for doing so; and his refusal . . . to answer does not, without more, furnish those grounds.'"

Anderer, 412 F.3d at 796, *citing* Florida v. Royer, 460 U.S. 491, 498, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (*citing* United States v. Mendenhall, 446 U.S. at 556, 100 S.Ct. 1870).

However, the Seventh Circuit's holding in effect states that Anderer's repeated refusal to speculate as to the cause of J.R.'s nosebleed could be used to "increase the 'probability or substantial chance' that Anderer committed a crime, thus elevating reasonable suspicion to probable cause." Anderer, 412 F.3d at 797. (App. 100). This is in contrast to the Seventh Circuit's prior holding in Beauchamp v. City of Noblesville, 320 F.3d 733, 743 (7th Cir. 2003). Id. Such a ruling that construes Anderer's silence against him as an element of probable cause has set aside more than 200 years of clear and unambiguous case law and must be corrected. Anderer, 412 F.3d at 795-98 (App. 96-102). As such, the Seventh Circuit's disregard for the perimeters of Anderer's plenary right to remain silent under the Fifth Amendment presents a substantial issue justifying Supreme Court review.

II. Without more than the statement of an unreliable witness, there was no probable cause to arrest Anderer making his arrest a violation of the Fourth Amendment.

It was concluded by this Court prior to Anderer that, "*sin qua non,* 'probable cause is a reasonable ground or belief of guilt.'" Anderer, 412 F.3d at 798; *citing.* Brinegar v. United States, 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949), *accord* Carroll v. United States, 267 U.S. 132, 161, 45 S.Ct. 280, 69 L.Ed. 543 (1925). In fact, "[t]he Fourth Amendment protects every United States citizen's right 'to be secure in their houses, persons, papers, and effects, against unreasonable searches and seizures.'" Id., citing U.S. Const. amend IV. (App. 102). As such, this Court also stated that the determination of probable cause is "viewed from the

standpoint of an objectively reasonable police officer . . ." Id., *citing* Ornelas v. United States, 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). (App. 103).

The district court granted defendants' motion for summary judgment dismissing Anderer's Complaint that he was arrested without probable cause despite its own finding that, "J.R.'s statement alone [was] an insufficient basis for probable cause. . . . After all if J.R. could manufacture one obvious lie (rape allegation) against an officer, he might also manufacture a more plausible lie against a different officer." Anderer, 412 F.3d at 799, *citing* Anderer, 342 F.Supp.2d at 802-03. (App. 103-104, 119). Prior to the Anderer decision, it was well established that "information from or about a [putative] victim of a crime would lead a reasonable officer to be suspicious, 'the officer should conduct further investigation.'" Spiegel v. Cortese, 196 F.3d 717, 724 (7th Cir. 2000), *citing* Hebron v. Touhy, 18 F.3d 421, 422-23 (7th Cir. 1994). Nonetheless, the district court found the defendants had probable cause despite the fact J.R. was an unreliable witness, and the IAD detectives had an exculpatory statement from Officer Shoman. Anderer, 412 F.3d at 799. (App. 103-104). Moreover, there was no "living, breathing individual [to] corroborate[d] J.R.'s allegations of abuse." Anderer, 385 F.3d at 1068. (App. 45).

On appeal, the Majority found that J.R. was a "reasonably credible" witness. Anderer, 385 F.3d at 1066. (App. 41). This was despite the fact that the record fully supported the district court's finding that J.R. was a completely unreliable witness. Anderer, 412 F.3d at 799-801; *see also* Anderer, 385 F.3d at 1066-1069. (App. 41-48; 103-108). More specifically, "[i]t is uncontroverted that throughout his encounter with the police on April 17, 2001, J.R. acted in an out-of-control manner that suggested that he was very (psychologically and emotionally) troubled individual." Anderer, 412 F.3d at 799. (App. 104).

The record is clear that prior to Anderer's arrest, J.R. repeatedly accused Officer Cook of raping him. Anderer, 412 F.3d at 799. (App. 104). A claim that J.R. confirmed was ridiculous when he admitted to the IAD detectives that Cook had only "nudged him on his buttocks with a flashlight." Anderer, 412 F.3d at 799-800; *see also* Anderer, 385 F.3d at 1068 (Coffey, J., dissenting). (App. 44, 104). Therefore, not only was the rape allegation a lie, but the admission that the allegation was a lie, undermined J.R.'s credibility despite the finding of "the majority that J.R. was 'consistent in reporting how he had been injured.'" Anderer, 412 F.3d at 799; *citing* Anderer, 385 F.3d at 1050. (App. 9-11, 104).

More importantly, for J.R. to have been a credible, reliable witness, the IAD investigators as well as all reviewing courts, would have had to take J.R.'s accusation that Anderer had struck him in the face as he was putting J.R. into his police vehicle at the marina which caused his nose and mouth to start bleeding. (App. 3). However, Officer Shoman's statement to IAD detectives placed serious doubt as to the credibility of J.R.'s statement because she told IAD detectives that she had observed J.R. in the back of Anderer's squad and she did not observe any blood or injury on J.R., nor observed any type of physical confrontation. (Record 26, Hoerig Aff., Ex. 1001, at 20). In other words, Shoman's observation of an uninjured J.R. in the back of Anderer's squad raised doubt as to the truthfulness of J.R.'s accusation that Anderer struck him in the face while placing him into his squad causing his nose and mouth to start bleeding. In addition, the IAD detectives interviewed Sgt. Jones who indicated that he was at the marina when the juveniles were loaded for transportation, was the last to leave the marina, and there was no evidence of fighting or injuries regarding the juveniles at the scene, nor had any type of complaint concerning physical fighting or injuries been made at the marina. (Id., at 18-19).

Further, any conclusion that Anderer struck J.R. during the transport is contradicted by the only witness the defendants had which caused them to form probable cause for Anderer's arrest. Anderer, 385 F.3d at 1068. (App. 45). The defendants' only witness was J.R., and he filed a written complaint prior to Anderer's arrest that Anderer, "hit [him] when he put [him] in the [squad] car." (App. 25). A fact J.R. also reiterated when he informed Detective Smith that it was when Anderer asked him what Officer Cook did to him, and he told Anderer that Officer Cook nudged his buttocks with a flashlight that caused Anderer to yell at him which caused J.R. to get smart with Anderer, and then to ignore Anderer by looking away, and when he turned back to face Anderer, that was when Anderer struck him in the face causing his nose and mouth to start bleeding. (Record 26, Hoerig Aff., Ex. 1001, at 7-8). Therefore, the fact that J.R. was not injured at the time he was turned over to Anderer for conveyance, the fact that J.R. was in Anderer's sole custody during conveyance from the marina to the second district, or that J.R. was handcuffed and in the back of Anderer's squad when he was conveyed to the second district station would not cause a reasonable police officer to conclude that the blood dripping from J.R.'s nose onto his chin when he got out of Anderer's squad at the second precinct was caused by Anderer striking J.R. in the face. This is because J.R. never alleged prior to Anderer's arrest that Anderer hit him at any time other than when Anderer placed him into the backseat of Anderer's squad. (Id.) Prior to Anderer's arrest, J.R. was very clear that Anderer hit him in the face while placing him into the squad, and that during conveyance from the marina to the second precinct, Anderer stopped the squad, got out of the squad, opened J.R.'s door and yelled at him and said he shouldn't be making up "bullshit lies." (Id.) However, never once prior to Anderer's arrest did J.R. accuse Anderer of hitting him during conveyance. (Id.) Therefore, since the defendants knew there was contrary evidence that Anderer had struck J.R. while placing him into the backseat of his squad, and that J.R. did not allege that Anderer had struck

him during transport, makes any finding that a reasonable officer would have probable cause to arrest Anderer because J.R. had no apparent injuries when turned over to Anderer's custody, was in Anderer's exclusive custody during transport from the marina to the second district station, or arrived at the second district station with blood dripping out of his nostril onto his chin as being totally irrelevant to support a battery charge against Officer Anderer. Simply put, if J.R. is to be believed at all, the hit did not occur while in transport, but as he was being put into the squad. A fact that was in doubt with investigating officers because of Shoman and Sgt. Jones' statements.

In addition, the defendants failed to establish probable cause because "J.R. displayed no physical signs of injury whatsoever anywhere on his face which failed to establish that he may have been hit or struck or assaulted in any manner by a 200 lb. police officer." Anderer, 412 F.3d at 800; *citing* Anderer, 385 F.3d at 1072 (Coffey, J. dissenting). (App. 52-53, 105).

Further, the defendants and IAD detectives discovered prior to Anderer's arrest that "J.R. was supposed to be taking no less than three psychotropic drugs at the time of his arrest" and had "failed to take his medication that day, thereby making him a menace and possible danger to himself and others." Anderer, 412 F.3d at 800; *citing* Anderer, 385 F.3d at 1058 n. 3 *and accompanying text* (Coffey, J. dissenting). (App. 25-26, 106). This is further supported by the fact that the defendants through the IAD detectives knew that J.R.'s mother had urged the MPD to "release [ ] [him] from custody as soon as possible in order that he might ingest his medication immediately." Id. This information taken together with the fact that J.R. had made spurious rape allegations against Officer Cook, there was a lack of any physical evidence suggesting he had been injured in any way, the lack of any evidence corroborating J.R.'s version of how he was hit, and his inconsistency in reporting the alleged

abuse, taken together with his failure to have taken his medication that day and his out-of-control behavior should have alerted any reasonable officer to be suspicious of this unreliable witness. Anderer, 412 F.3d at 800-01. (App. 106-107). This is because when a reasonable officer receives information about a person claiming to be a victim of a crime that would lead him to be suspicious, further investigation is prudent because "the reasonableness" standard of the fourth amendment [sic] links the constitutional obligation to the standard of prudent conduct, [requiring] the officer [to] do more. Anderer, 412 F.3d at 800; *citing* Hebron v. Touhy, 18 F.3d 421, 422-23 (7th Cir. 1994). (App. 105-106).

> Therefore, because J.R. was not a credible witness, the IAD's investigating officers were, by law, required to conduct further investigation into J.R.'s allegations of abuse; and if they had, the IAD would have discovered and been convinced beyond a shadow of a doubt that Anderer had not committed any crime.

Anderer, 412 F.3d at 801; *citing* Beauchamp, 320 F.3d at 743. (App. 107).

In this respect, they could have interviewed the citizen witness whose name and phone number was in their possession at the time of Anderer's arrest and learned that he:

> Watched every step of the way while Officer Anderer was taking [J.R.] to his squad car [and as] Officer Anderer guide[d] [J.R.] into the back seat of the squad, [he] saw Officer Anderer seatbelt J.R., close the door securing him in the back of the squad, and . . . [a]t no time did [he] see Officer Anderer strike [J.R.] or act in any abusive manner toward him . . . [instead, Mitchell commented that]

> at all times . . . Anderer acted in a very professional manner [towards J.R.].

Anderer, 412 F.3d at 801; *citing* Anderer, 385 F.3d at 1048 (Coffey, J., dissenting). (App. 75, 108).

"In addition, six police officers testified that they did not observe Anderer abuse or even yell at J.R., much less punch him in the face as he was being put into the police conveyance (as was claimed by the abusive, foul-mouthed and out-of-control J.R.)." Id. (App. 75-76, 108). In other words, had the MPD "performed a legally sufficient and unbiased investigation prior to Anderer's arrest, they would have learned from the officers on the scene that Anderer did not, at any time, strike or even raise his voice at J.R. before placing him in the squad car at the marina." Id., at 801-02. (App. 108). Moreover,

> It is both inaccurate and disingenuous for the majority to speculate, as the trial judge did, and state that Anderer could have struck J.R. while conveying him to the District 2 police station when all recorded evidence, not to mention the evidence available to the MPD at the time (recall that J.R. did not say that he had been struck in the car until after Anderer's arrest), suggests that this is impossible.

Id., at 802. (Pet App. 109).

The decision of the Seventh Circuit rewrites the requirement to conduct further investigation to form probable cause as is required by the Fourth Amendment when confronted with a completely unreliable witness. Anderer, 412 F.3d at 798-803 (Coffey, J. dissenting). (App. 102-112). And as such, the Seventh Circuit's disregard for this principal in establishing probable cause under the Fourth

Amendment presents a substantial issue justifying Supreme Court review.

CONCLUSION

For all of the foregoing reasons, the petitioner, Joseph R. Anderer, Jr., respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No. 02-3669

JOSEPH R. ANDERER, JR.,

Plaintiff-Appellant,

v.

POLICE CHIEF ARTHUR JONES, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 01-C-668—J.P. Stadtmueller, *Judge.*

ARGUED FEBRUARY 25, 2003—DECIDED OCTOBER 6, 2004

Before POSNER, COFFEY, and WILLIAMS, *Circuit Judges.*

WILLIAMS, *Circuit Judge.* Joseph R. Anderer, Jr. is a former Milwaukee police officer who was arrested for physically abusing a child. Though he was not prosecuted, Anderer was terminated following an internal affairs investigation into this incident. Anderer sued the police chief, other officers involved in his arrest, and the City of Milwaukee for violating his Fourth Amendment rights by arresting him without probable cause, and for terminating his employment after his representative spoke out against the arrest and Anderer filed this lawsuit. Finding that probable cause existed at the time Anderer was arrested and that the

speech at issue was not protected by the First Amendment, the district court granted summary judgment to defendants. We agree with the district court's decision and affirm.

I. BACKGROUND[1]

On April 17, 2001, Milwaukee police officer Joseph Anderer and several other officers arrested four juveniles for burglarizing a boat. After the juveniles were handcuffed, and while they were being escorted to the patrol cars, one 12-year-old boy (whom we will call JR) started shouting that one of the officers who was escorting him to the car, Officer Jeffrey Cook, was touching him on the buttocks and trying to rape him. Three of the juveniles were then transported to the police station by Officer Cook and his partner Officer Jeffrey Logan, while Sergeant Michael Jones, Officer Janice Shoman, Anderer, and JR remained behind. JR was placed in a patrol car and driven to the station by Anderer, while Sgt. Jones interviewed witnesses before returning to the station.

Once Anderer and JR arrived at the station, several officers noticed that JR was bleeding from the nose and mouth and had blood on his clothing. Lieutenant Kim Stack asked JR what happened, and he said that Anderer hit him in the face. When Sgt. Jones heard Lt. Stack talking to JR, he asked JR what had happened to him, and JR said that Anderer hit him. Sgt. Jones then asked Anderer how JR had received the bloody nose, to which Anderer responded, "how would I know . . . I just transported him." Several other officers also interviewed JR, including Lt. Mary Hoerig and

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[1] Because "[t]he existence of probable cause turns on the information known to the officers at the moment the arrest is made, not on subsequently-received information," *Spiegel v. Cortese*, 196 F.3d 717, 723 (7th Cir. 2000), we limit our recitation of facts to those known at the time of the arrest.

Detective William Smith of the Internal Affairs Department (IAD), and he told them all that he had been hit in the face by Anderer.

When Det. Smith interviewed him, JR explained the details of the burglary for which he had been arrested. JR said that when he was placed in Anderer's patrol car, Anderer did not immediately shut the door, but instead asked him questions about what JR had been saying Officer Cook did to him. JR then said that when he told Anderer that Officer Cook nudged him in the buttocks with a flashlight, Anderer started yelling at him and told him he shouldn't be making up "bullshit lies." JR told Det. Smith that he got smart with Anderer, ignored him, and looked away. JR stated that when he turned back to face Anderer, Anderer struck him in the face and caused his nose and mouth to bleed.[2] JR added that while he was being transported to the station, Anderer was yelling at him and saying "do you understand me?", and at one point stopped the car, opened the back door, and said he was going to "whip [JR's] ass." JR said he thought they were alone when all of this occurred and did not know if anyone else had witnessed it.

While others were talking to JR, Officer Cook contacted JR's mother to inform her that JR had been arrested. JR's mother admitted that she was not surprised that JR had been arrested for burglary and advised Officer Cook that JR was taking several prescription medications, including two that Officer Cook recognized as pills to "help control a person's mental state." She also told him that JR had not taken his medication that day and needed to be released from custody as soon as possible. Officer Cook informed Sgt. Brunson and IAD Detectives Harrison and Smith that he had been in contact with JR's mother and that JR had been prescribed a variety of drugs that he had not taken all day

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[2] Photographs were later taken that showed cuts on the inside of both of JR's lips, and blood on his shirt and pants.

and should be processed as soon as possible.

Det. Smith attempted to interview Officers Cook and Logan about the facts surrounding JR's arrest and the cause of his injuries, but they refused to give a statement without police union representatives present. Det. Smith interviewed Sgt. Jones, who indicated that he was the last person to leave the scene of the arrest and that he had not seen any sign of injury to JR. Sgt. Jones informed Det. Smith that he saw no blood on JR at the scene, and probably would not have noticed the cuts on the inside of JR's lips, but there was enough blood on his shirt at the station that he would have noticed it if it had been there earlier. Sgt. Jones then relayed to Det. Smith the substance of his interview with JR, in which JR detailed the events that resulted in his arrest and the interactions with Anderer that resulted in JR's bloody nose and lip.

Detectives Smith and Harrison then interviewed Officer Janice Shoman, who also provided details about JR's arrest. She indicated that she left the scene to pursue another crime before JR was transported to the station, but before she left she saw Anderer with JR in the back of Anderer's car. She could not recall if JR had handcuffs on, but did not see any physical confrontation between JR and Anderer. She stated that she did not see any blood or injury on JR, and said she would have noticed if there had been blood on his shirt.

Anderer refused to give a formal statement without union representation, but at one point asked, "off the record,"[3] "What did he say I hit him with?" When he was told by one officer that JR said he had punched him in the face, Anderer stated that he was a 200 pound man and if he had punched JR in the face it would have left bruises on JR. Anderer

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[3] While Anderer's question was meant to be "off the record," Anderer put the contents of this "off the record" conversation in both his affidavit and his briefs.

then let the investigating officers inspect his hands, but no photographs were taken, as there did not appear to be any marks or injuries on them. Anderer did not provide any explanation for how JR received the cuts and bloody nose. He did not indicate that there had been any force exercised in effecting the arrest, nor did he suggest that any kind of accident or incident had occurred on the way back to the station. Anderer states that during the course of his "off the record" conversations with them, Detective Harrison, Lt. Stack, and Officer Cook told him that they thought JR's claim was bogus, to which Anderer responded to Officer Cook that he thought was going to get "*Driebeled*."[4]

Lt. Hoerig placed a call to Milwaukee Police Chief Arthur Jones to apprise him of the situation. Chief Jones asked Lt. Hoerig if she thought there was probable cause to arrest Anderer for physical abuse of a child, in violation of WIS. STAT. § 948.03. Lt. Hoerig informed Chief Jones that she believed there was probable cause to arrest, and the investigating detectives concurred. Chief Jones asked Lt. Hoerig if she would arrest Anderer if he were a private citizen, and Lt. Hoerig indicated that she would. Chief Jones then ordered Anderer's arrest.

Immediately following his arrest, Anderer was taken to the Milwaukee County Criminal Justice Facility, where he was held for twelve hours before being released without bail. That afternoon, April 18, Anderer appeared at the Deputy District Attorney's office to make a statement, but

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[4] Getting "*Driebeled*" is a slang term used by Milwaukee police officers that refers to a police officer who is arrested without probable cause. We assume the term takes its name from the facts underlying this court's decision in *Driebel v. City of Milwaukee*, 298 F.3d 622 (7th Cir. 2002), in which we concluded that probable cause to arrest did in fact exist at the time that Officer Robert J. Driebel was arrested. *Id.* at 645. In that case, however, we did find that there was no probable cause to arrest another officer (Officer Johnny C. Sgrignuoli). *Id.* at 651.

because the union attorney was not present, his statement was to be rescheduled. On April 19, after being authorized by Anderer, union president Bradley DeBraska told a local TV station that Anderer was arrested without probable cause because of vindictiveness of the IAD Unit due to prior run-ins between Anderer and one of the IAD investigators, and the union was "hoping and praying" Anderer would sue the police department to correct these wrongs.

On June 7, the district attorney's office decided not to pursue the criminal charges against Anderer with respect to JR's accusation. At that time, a local Milwaukee television station reported that charges would not be pursued and that Anderer had retained an attorney to file a complaint against the Milwaukee Police Department and its police chief. On June 13, the reopened criminal investigation into JR's allegations was closed and no further information was developed to further a potential prosecution. On June 19, Anderer was required to give a statement to the IAD for the purpose of a work-rule-violation investigation of his excessive use of force.

On July 2, Anderer filed suit in federal district court alleging violations of his civil rights for arresting him without probable cause with respect to JR's accusation. On July 6, the IAD commander issued charges against Anderer alleging that he violated rules and regulations with respect to JR's arrest, and in doing so he quoted from the allegations in Anderer's complaint. On July 17, Chief Jones terminated Anderer's employment, which Anderer has appealed to the City's Fire and Police Commission. Anderer then filed an amended complaint, adding a count alleging that he was terminated in retaliation for exercising his First Amendment rights.

Defendants filed a motion for summary judgment, claiming that there was probable cause to arrest Anderer and that his First Amendment count failed to state a claim for

relief. The district court granted summary judgment on Anderer's Fourth and First Amendment claims, finding that there was probable cause for his arrest and the speech at issue concerned a private personal dispute that was not a "matter of public concern." Anderer appeals.[5]

II. ANALYSIS

A. Probable Cause to Arrest

We review a district court's grant of summary judgment de novo, and in doing so draw all reasonable inferences from the record in the light most favorable to Anderer, the non-movant. *Woods v. City of Chicago*, 234 F.3d 979, 986 (7th Cir. 2000). This court discussed at length the standard for evaluating probable-cause-to-arrest challenges in § 1983 cases in *Spiegel v. Cortese*, 196 F.3d 717, 723 (7th Cir. 1999), and *Driebel v. City of Milwaukee*, 298 F.3d 622 (7th Cir. 2002). Probable cause is "'a commonsense determination, measured under a reasonableness standard.'" *Spiegel*, 196 F.3d at 723 (quoting *Tangwall v. Stuckey*, 135 F.3d 510, 519 (7th Cir. 1998)). Probable cause exists if, at the time of the arrest, "'the facts and circumstances within [the arresting officer's] knowledge and of which she has reasonably trustworthy information would warrant a prudent person in believing that the suspect had committed or was

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[5] The district court, in granting defendants' motion for a protective order, stayed all discovery pending the court's resolution of defendants' summary judgment motion. The district court also denied Anderer's request for copies and use of JR's post-arrest medical records in defendants' possession (apparently unlawfully obtained). Because JR's medical records were obtained after Anderer was arrested, they are irrelevant to the probable cause determination. *See Spiegel*, 196 F.3d at 723. Therefore, we do not find that the district court abused its discretion in denying Anderer's request for access to and use of the records.

committing an offense.'" *Id.* (quoting *Qian v. Kautz*, 168 F.3d 949, 953 (7th Cir. 1999)).

In evaluating whether probable cause was reasonably determined, the court "must consider the facts as they would have reasonably appeared to the arresting officer 'seeing what he saw, hearing what he heard' at the time of the incident." *Driebel*, 298 F.3d at 643 (quoting *Richardson v. Bonds*, 860 F.2d 1427, 1431 (7th Cir. 1988)); *Spiegel*, 196 F.3d at 723 ("The existence of probable cause turns on the information known to the officers at the moment the arrest is made, not on subsequently-received information."). "An officer's belief in the existence of probable cause '*need not be based on evidence sufficient to support a conviction, nor even a showing that the officer's belief is more likely true than false.*'" *Driebel*, 298 F.3d at 643 (quoting *Woods*, 234 F.3d at 996) (emphasis in original). Accordingly, "'as long as a reasonably credible witness or victim informs the police that someone has committed, or is committing, a crime, the officers have probable cause to place the alleged culprit under arrest, and their actions will be cloaked with qualified immunity if the arrestee is later found innocent.'" *Spiegel*, 196 F.3d at 723 (quoting *Jenkins v. Keating*, 147 F.3d 577, 585 (7th Cir. 1998)). In reviewing a probable cause determination, the court should consider whether the arresting officer "'acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed several years after the fact.'" *Id.* (quoting *Humphrey v. Staszak*, 148 F.3d 719, 725 (7th Cir. 1998)). "Moreover, this court has emphasized that once probable cause has been established, officials have 'no constitutional obligation to conduct any further investigation in the hopes of uncovering potentially exculpatory evidence.'" *Id.* (quoting *Eversole v. Steele*, 59 F.3d 710, 718 (7th Cir. 1995)).

With these standards in mind, we agree with the district

court's conclusion that probable cause to arrest existed at the time Anderer was arrested.[6] In Wisconsin, a person physically abuses a child when he intentionally or recklessly "causes bodily harm to a child." WIS. STAT. § 948.03. Here, JR arrived at the police station in Anderer's sole custody and was bleeding from his nose and mouth with split lower and upper lips, and no police officer observed him in that condition at the time of his arrest or when he was turned over to Anderer's sole custody. JR told several police officers the same story: Anderer had hit him in the face when JR had gotten "smart" with Anderer.[7] Anderer

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[6] The dissent's analysis stresses that the summary judgment standard requires us to view all facts in the light most favorable to Anderer. While we certainly view all facts in the light most favorable to Anderer and draw all reasonable inferences in his favor, *Woods*, 234 F.3d at 986, our review of a probable cause determination does not ask whether an officer's belief in the existence of probable cause is more likely true than not true. *Driebel*, 298 F.3d at 643. Rather, our review focuses on whether a reasonable officer would have believed that probable cause existed to arrest Anderer based on the facts and circumstances known to the officer at the time of the arrest. *See id.*; *see also Beauchamp v. City of Noblesville*, 320 F.3d 733, 743 (7th Cir. 2003) ("Probable cause is only a probability or substantial chance of criminal activity, not a certainty that a crime was committed") (citing *Illinois v. Gates*, 462 U.S. 213, 244 n. 13 (1983)).

[7] Anderer claims that JR's story is inconsistent because while all the officers reported that JR said Anderer "hit" him in the face (statements or reports of Officers Cook and Logan, Lt. Stack, and Sgt. Jones), Anderer says one officer told him that JR had said Anderer "punched" him in the face (Det. Harrison's statement to Anderer in "off the record" conversation), and one report indicates JR said Anderer "back-handed" him in the nose and mouth (Det. Smith's report of JR's statement to Deputy District Attorney the day *after* Anderer was arrested). We think this is a difference without a distinction, as they are all forms of "hits." Furthermore, because

(continued...)

offered no explanation to the investigating officers for how JR's injuries might otherwise have occurred, and appears only to have inquired about what JR claimed Anderer had hit him with. Given these circumstances—a 12-year-old's injuries and bloody appearance, his consistency in reporting how he had been injured, and Anderer's total failure to provide any explanation for the injuries when no other officer observed JR in that condition prior to turning him over to Anderer's sole custody[8]—we believe the Milwaukee police officers had probable cause to believe that Anderer had intentionally or recklessly caused JR's bodily injury. *See* WIS. STAT. § 948.03.

Anderer claims that JR was not a credible victim because (1) he had made other allegations about Officer Cook earlier that evening, and (2) the officers investigating JR's claims knew JR was on medication for mental illness and had failed to take his pills that day. We disagree with Anderer's conclusion with respect to both assertions. JR himself

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[7] (...continued)
the "back-handed" description was not known at the time of Anderer's arrest, it is irrelevant to our analysis. *See Spiegel*, 196 F.3d at 723.

[8] Although the dissent contends that any reference to Anderer's failure to explain JR's bloody appearance in the probable cause analysis impinges on Anderer's Fifth Amendment and contractual rights, Anderer himself makes no such argument and, in fact, concedes his inability to explain JR's injuries. *See* Pl.'s Resp. to Def.'s Motion for Summ. J. at 73 ("[D]efendants state they are entitled to summary judgment because it is undisputed that Anderer did not explain how J.R. was injured, or claim that he used lawful force to maintain custody of J.R. In this respect, plaintiff does not dispute these facts."). Recall, too, that before Anderer said he did not wish to make a formal statement without union representation—the focus of the dissent's argument on this point—Anderer made several voluntary comments to other officers, including that he did not know how JR received the bloody nose. (Compl. ¶ 34; Anderer Aff. ¶¶ 60, 75, 79-81.)

reported to the investigators that he had made allegations about Officer Cook and he explained that it was his repetition of those statements to Anderer that he believed prompted Anderer's hostility and violence. As for JR's failure to take his medication, the fact that the investigating officers knew about JR's medication does not *ipso facto* negate JR's credibility or require the officers to further investigate JR's medical history to substantiate or refute his claim of abuse by Anderer, *see Driebel*, 298 F.3d at 643; *Spiegel*, 196 F.3d at 723. And the fact that investigators later learned that JR had previously been diagnosed with psychosis, paranoia, hallucinations, and self-mutilation is irrelevant to what the officers reasonably knew at the time they arrested Anderer. *Spiegel*, 196 F.3d at 723.[9]

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[9] As we have noted, "[t]he existence of probable cause turns on the information known to the officers at the moment the arrest is made, not on subsequently-received information." *Spiegel*, 196 F.3d at 723. In addition to later-acquired knowledge about JR's medical history, we are puzzled by the dissent's discussion of irrelevant facts which have no bearing on what the officers reasonably knew when they arrested Anderer, such as: (1) the Deputy District Attorney's later decision not to pursue criminal charges; (2) subsequent investigations into Anderer's arrest; (3) statements in affidavits signed after Anderer's arrest containing information other than that made known to officers before Anderer's arrest; (4) photographs of JR, as they were developed after Anderer's arrest; and (5) statements made by identification technicians after the arrest. While the dissent's discussion of these facts and the adequacy of the department's investigation might present a persuasive closing argument in a criminal trial, the officers did not need to establish Anderer's guilt of the underlying charge beyond a reasonable doubt, or even by a preponderance of the evidence, before arresting him. *See United States v. Funches*, 327 F.3d 582, 587 (7th Cir. 2003). Moreover, although the dissent emphasizes that no officer saw Anderer hit JR, that no officer saw the action does not negate the undisputed facts that a 12-year-old boy, unin-

(continued...)

Anderer further claims that no officers corroborated JR's allegation and that no effort was made to interview the other officers and citizen witnesses who were present at the time of the arrest. First, while Sgt. Jones and Officer Shoman could not corroborate JR's allegation against Anderer, neither could they refute it, and both stated that JR was not bloody at the time he had been turned over to Anderer's sole custody. Second, Sgt. Jones and Officer Shoman were interviewed, and there were efforts made to interview other officers; Officers Cook and Logan were asked to provide a statement prior to Anderer's arrest, but they refused to do so without union representation. Notably, when Officers Cook and Logan finally agreed to give statements (very shortly after Anderer's arrest), they could neither corroborate nor refute JR's allegations. Furthermore, they could not explain JR's bloodied condition, and both stated that JR had not been bloody at the time he was turned over to Anderer's sole custody.[10]

Anderer also asserts that probable cause was lacking because two identification technicians ("ID techs") who took

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[9] (...continued)
jured at the time he was turned over to Anderer, arrived at a police station with blood on his face and shirt after being in Anderer's sole control, identified Anderer as the cause of his injuries, and neither Anderer nor any other officer could offer any explanation for the boy's injuries.

[10] Indeed, the statement given by Officer Cook, had it been given prior to Anderer's arrest, seems likely to have further supported the investigating officers' determination that probable cause existed to arrest Anderer. (He told the investigators that when Anderer and JR arrived at the station, he "immediately noticed [JR] with blood running down both nostrils, his chin, blood on his shirt and both pant legs," and "was taken aback because the kid was in perfectly good shape before he went into the squad, but not when he came out and thought that's not good.")

photographs of JR's injuries and appearance within hours of Anderer's arrest believed that "there were no injuries on JR" or that the injuries were "very minor." Anderer appears to believe that these ID techs should have been consulted by the officers investigating JR's claims prior to arresting Anderer, but we fail to see why this would be necessary when the investigating officers themselves regularly investigate batteries against persons and are capable of assessing the nature and possible cause of injuries. And once those officers determined that probable cause had been established, they had "'no constitutional obligation to conduct any further investigation in the hopes of uncovering potentially exculpatory evidence.'" *Spiegel*, 196 F.3d at 723 (quoting *Eversole*, 59 F.3d at 718). Furthermore, one ID tech did not photograph JR until *after* Anderer had already been arrested, and so would have had nothing to contribute to the probable cause determination prior to his arrest, and the other ID tech's photographs were not developed until *after* Anderer's arrest.[11]

Finally, Anderer points to other occurrences after his arrest as evidence to support his argument that probable

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[11] We note that the ID techs' "observations" were not included in the initial affidavits that they provided six months after the incident, and were only included in the affidavits they provided a year after they took the photographs. We review probable cause determinations based on the information available at the time of the arrest, to assess whether the arresting officer "'acted reasonably under settled law in the circumstances, *not whether another reasonable, or more reasonable, interpretation of the events can be constructed several years after the fact.*'" *Spiegel*, 196 F.3d at 723 (quoting *Humphrey*, 148 F.3d at 725) (emphasis added). Similarly, the dissent's conjecture that other factors could have caused JR's bloody nose and cuts to his face does not bear on our analysis. Again, we emphasize that our inquiry focuses on whether probable cause existed to arrest Anderer, not on whether other explanations for JR's injuries are also possible. *See id.*; *Driebel*, 298 F.3d at 643.

cause did not exist. Anderer challenges JR's credibility by arguing that the Deputy District Attorney's decision not to pursue criminal charges means there was no prosecutorial merit to JR's claim. The decision not to pursue criminal charges,[12] made months after the actual arrest and with information not available at the time of the arrest, *see Driebel*, 298 F.3d at 643, does not constrain or guide our analysis of whether probable cause existed at the time Anderer was arrested. *See id.* ("An officer's belief in the existence of probable cause '*need not be based on evidence sufficient to support a conviction, nor even a showing that the officer's belief is more likely true than false.*'") (quoting *Woods*, 234 F.3d at 996) (emphasis in original). It is similarly not relevant to our analysis that the booking judge commented, when ordering Anderer's release without bail, that JR's "allegations against [Anderer] were baseless and that the show up report presented no probable cause to have [Anderer] arrested in the first place."

B. Retaliation for First Amendment Speech

Anderer alleges that he was retaliated against and terminated, in violation of his First Amendment rights, in response to (1) statements made by union president Bradley DeBraska,

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[12] The Deputy District Attorney, in his memo explaining his decision not to pursue charges, recounted the facts of JR's claims and wrote that, while he could not "state with assurance what happened[,] [he] believe[d] it more probable, particularly in view of [his] knowledge of prior complaints against Anderer, that Anderer did strike [JR]. It is entirely conceivable, however, that given [JR's] agitation, mental problems and stated intentions to get money out of this incident, that he inflicted the injuries to himself. Such speculation, however, is not the stuff of criminal charges, and none can be proven in this case."

with Anderer's apparent authorization,[13] that Anderer had been arrested without probable cause as a result of IAD vindictiveness due to personal animus with one of the IAD investigators, and that the union was "hoping and praying" that he would sue the police department to correct these wrongs, (2) Anderer's confirmation that he had retained a lawyer to look into the matter, and (3) his filing of this lawsuit against defendants.

Whether a government employee's speech is protected by the First Amendment is a legal question that we review de novo. *Gustafson v. Jones*, 290 F.3d 895, 906 (7th Cir. 2002). As we explained in *Gustafson*, there are four elements to a First Amendment retaliation claim,[14] but the only element at issue here is whether Anderer's speech was a "matter of public concern." *Id.* at 906-07. "Whether a government employee's speech addresses a matter of public concern depends upon 'the content, form, and context of [the speech] as revealed by the whole record.'" *Id.* at 907 (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)). "Of these three factors,

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[13] We will assume, without deciding, that speech authorized by one person but made by another could be the basis for an First Amendment claim.

[14] To prove a First Amendment retaliation claim in the employment context, "[f]irst, the plaintiffs must prove that their speech was a matter of public concern. Next, they must prove that their speech played at least a substantial part in the employer's decision to take an adverse employment action against them. If the plaintiffs can carry their burden on these two elements, the defendants can only prevail if they prove by a preponderance of the evidence that the government's interest, as an employer, in efficiently providing government services outweighs the employees' First Amendment interests, or if they can prove that they would have disciplined the employees even in the absence of the speech." *Id.* (citing *Klunk v. County of St. Joseph*, 170 F.3d 772, 775 (7th Cir. 1999); *Hellstrom v. United States Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000)).

content is the most important." *Id.* (citations omitted); *Campbell v. Towse*, 99 F.3d 820, 827 (7th Cir. 1996). "The 'public concern' element is satisfied if the speech can fairly be said to relate to a matter of political, social, or other concern to the community, rather than merely a personal grievance of interest only to the employee." *Gustafson*, 290 F.3d at 907 (citing *Connick*, 461 U.S. at 146). If the speech is not on a matter of public concern, "it is unnecessary for us to scrutinize the reasons for [the employee's] discharge." *Connick*, 461 U.S. at 146.

The content of the speech at issue here was, quite plainly, a matter solely of Anderer's private concern. The speech concerned and addressed only Anderer's arrest; nothing in these statement alleges any greater societal impact than Anderer's possible grievance for being arrested, *Connick*, 461 U.S. at 147-48; *Gustafson*, 290 F.3d at 908. Anderer claims that his speech was a matter of public concern because "pervasive and systematic misconduct" in the Milwaukee police department leads to a high number of arrests of officers without probable cause and that bringing this to light was the motivation for the speech. We acknowledge that motive is relevant to the "matter of public concern inquiry, [though] it is not dispositive," *Gustafson*, 290 F.3d at 908 (citations omitted), but "speech on a subject that would be of interest to the public will not be protected if 'the expression addresses only the personal effect upon the employee.'" *Id.* (quoting *Marshall v. Porter County Plan Comm'n*, 32 F.3d 1215, 1219 (7th Cir. 1994)). And while we recognize that there are few matters "of greater public concern in a large metropolitan area than police protection and public safety," *Auriemma v. Rice*, 910 F.2d 1449, 1460 (7th Cir. 1990) (en banc), nothing in the speech at issue here addresses or seeks to resolve anything about what Anderer may or may not have believed regarding the police department's or Chief Jones's policies, other than his dissatisfaction with his arrest and his desire for personal redress. As such, his speech

cannot fairly be described as a "matter of public concern," and any further inquiry into why he was terminated is unnecessary given the wide latitude we afford government officials in managing their offices. *See Connick*, 461 U.S. at 146; *Driebel*, 298 F.3d at 638 (discussing internal affairs investigatory tactics employed by the Milwaukee police department).

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

COFFEY, *Circuit Judge*, dissenting. Joseph Anderer, a recently discharged Milwaukee police officer, argues on appeal that his constitutional rights were violated when he was arrested, booked and detained, and subsequently terminated from his employment (3.5 years) on the orders of Chief Arthur Jones of the Milwaukee Police Department ("MPD"), based almost exclusively on the fabricated story of an incorrigible and psychotic juvenile, without a scintilla of corroborating evidence. The majority attempts to defend his arrest and refuses to accept Anderer's contention and argument—which finds full support in the record—that his accuser, an out-of-control juvenile named "JR," who also maliciously created another fabricated accusation against a second officer stating that he had raped him, was likewise wholly incredible. As the trial judge noted when finding JR incredible: "*[a]fter all, if J.R. could manufacture one obvious lie against an officer, he might also manufacture a more*

plausible lie against another officer." *Anderer v. Jones*, No. 01-C-0668, at *6-7 (E.D. Wis., Sept. 30, 2002) (emphasis added). The reality of the situation is that the false information JR gave to investigators concerning Anderer's involvement in the alleged assault fell far short of establishing probable cause to arrest him and the investigators' belief in JR's veracity was just one component of a mishandled and goal-oriented (have Anderer arrested) investigation which lacked good-faith and which the majority now condones.

The majority also fails to recognize and avoids the fact that the investigation fell far short of a proper police inquiry, lacking in objectivity and fairness. Indeed, the Milwaukee Police Department, INTERNAL AFFAIRS DIVISION ("IAD") investigators looking into JR's false and malicious complaint, for reasons unexplained, saw fit *to systematically ignore the exculpatory statement* given by Officer Janice Shoman prior to Anderer's arrest and then proceeded to fail to timely interview four other police officers, Officers Cook, Centeno, Logan and Bohlen (all who would have given exculpatory statements), and one lay witness, Mitchell (who investigators *well knew prior to Anderer's arrest would have exonerated him*). *See infra* pp. 24-25, 28-30, 48-49, 57-58, 70-72.

There was absolutely no credible evidence uncovered by the investigators even suggesting that Anderer had committed a crime prior to his arrest. For example, Officer Shoman told IAD investigators prior to Anderer's arrest that she would have noticed any altercation whatsoever between Anderer and JR because of her close proximity to him if, in fact, it had taken place, and that she witnessed no such incident. Notwithstanding the exculpatory nature of this evidence, the majority distorts her testimony and cavalierly states that Shoman could not "refute" JR's story. Opinion at *12. Indeed, five of the six police officers present at the scene, when questioned, later did corroborate Shoman's statement when testifying under oath (affidavit) that Anderer did not strike JR while putting him in the squad car, as JR

had specifically stated that Anderer had done. *See infra* pp. 74-81. In the end, the only credible fact in the record that the majority cites to suggest that Anderer committed, or was committing, an offense is his failure to explain JR's alleged injuries. Anderer (as a police officer and American citizen) was well aware that his refusal and/or silence was fully protected under both his constitutional and contractual rights. The majority's attempt to use the police officers' repeated refusals to answer questions as a fundamental factor in establishing probable cause is completely misguided, for no one, not even a law enforcement officer, can be forced to give evidence against himself while the subject of a criminal investigation. Indeed, no court has ever held that the refusal to answer questions that might incriminate a suspect would allow law enforcement officers to elevate reasonable suspicion to probable cause based on such a refusal. *Cf. Hiibel v. Sixth Judicial Dist. Court*, 124 S.Ct. 2451, 2460-61 (2004); *see infra* pp. 52-54. The majority implies that since neither party raised this argument we do not have jurisdiction to address this constitutional question; however, I am confident the majority realizes that this Court does have the discretion to resolve a constitutional issue discovered in the record before us *sua sponte*, contrary to the majority's suggestion. *See* Opinion at *10 n.8. As the Supreme Court has made clear "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases . . . *Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where THE PROPER RESOLUTION IS BEYOND DOUBT, or WHERE INJUSTICE MIGHT OTHERWISE RESULT.*" *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (emphasis added) (internal citations omitted); *See infra* pp. 63-65. I believe that it is our duty to do so. It is "well-settled . . . [that] [p]olicemen . . . are not relegated to a watered-down version of constitutional rights," *Driebel v. City of Milwau-*

kee, 298 F.3d 622, 637 (7th Cir. 2002) (quoting *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967)), and we must not ignore the serious constitutional problems raised by using Anderer's silence as a factor establishing probable cause.

In addition, the majority, without explanation, refuses to accept the well known fact that there are maladies such as a plain, everyday nosebleed or those nosebleeds of the type frequently caused by the injestion of a myriad of prescribed psychotropic drugs and other medications *known and accepted* as causing and contributing to nosebleeds. *See infra* pp. 26-28, 46-47, 73-75, 86-88. This fact becomes even more germane when viewed in combination with the established evidence that the only person claiming Anderer committed a crime was the out-of-control JR himself; a swearing, cursing malcontent who, in his attempt to get even with the arresting police officers (*i.e.*, threatened that he would "get paid" and "have [their] jobs") accused one, Officer Cook, of rape and accused the other, Anderer, of striking him in the face and nose, causing him to bleed. *See infra* pp. 23-25, 30-31, 42-44, 51-52, 70-72, 86-88. However, JR's accusation flies in the face of common sense and logic because the lying juvenile burglar suffered no bruises, abrasions, lacerations, contusions, much less swelling to any part of his face, nose or lips which might give some credence to his allegation that he had been struck by a 200 lb. police officer. This is not to mention that in addition to the lack of physical signs of abuse on the purported victim, there are five credible witnesses who were present at the scene and stated that they never witnessed Anderer assault JR at any time, much less during the particular time frame when Anderer was assisting him with his entry into the squad car. *See infra* pp. 24-25, 28-30, 48-49, 57-58, 70-72, 75-81. Therefore, in light of the relevant facts and circumstances, Anderer's arrest was not predicated on information from a "reasonably credible witness or victim," as the trial judge found, nor does it qualify as being based on "reasonably trustworthy

information [that] would warrant prudent person in believing that [Anderer] had committed or was committing an offense." *Spiegel v. Cortese*, 196 F.3d 717, 723 (7th Cir. 2000) (quoting *Qian v. Kautz*, 168 F.3d 949, 953 (7th Cir. 1999)). In effect, the majority is taking the word of a psychotic, uncontrollable, lying juvenile over that of six credible witnesses and a plethora of very convincing circumstantial evidence.

Indeed, the trial judge went on to state that JR was not a credible witness. Judge Stadtmueller found that "J.R.'s statement alone [was] an insufficent basis for probable cause." *Anderer v. Jones*, No. 01-C-0668, at *6-7 (E.D. Wis., Sept. 30, 2002). The majority disagrees with the trial judge's clear statement on the credibility subject and, in support of this holding, argues that JR told other officers that he made rape allegations against Cook and that he "told several police officers the same story." *See* Opinion at * 9, *12. However, the record reflects that once the investigation concerning Anderer ensued, (in contrast to the majority's contention) JR when interviewed never repeated his "rape" allegation, but claimed only that he had been "nudged" in the buttocks. Smith Report ¶ 5. Nevertheless, even if we were to assume, for purposes of this discussion, that JR did repeat his ridiculous allegations against Cook word-for-word to other officers, this does not *ipso facto* negate all of the other facts which rendered JR's allegations incredible and would, in fact, only serve to further undermine the value of the juvenile's description of events. *See infra* pp. 43-45.

The majority also attempts to characterize a number of post-arrest events as "irrelevant facts," such as: (1) "the Deputy District Attorney's later decision not to pursue criminal charges"; (2) "photographs of JR, as they were developed after Anderer's arrest"; and (3) "statements made by ID technicians after the arrest." See Opinion at *11 n.9. However, as we make clear, all of this evidence is used, not as part of a probable cause review, but to further establish

that the IAD investigators responsible for conducting the probable cause inquiry were neither being truthful nor fair and objective when they claimed that JR was "seriously injured" and that their investigation (which can best be described as no more than a rush to judgment) suffered from a serious lack of good-faith, resulting in an improper finding that probable cause existed to arrest the officer. *See infra* pp. 43-55, 83-85, 91-94 (discussing the deputy district attorney's decision not to prosecute); pp. 52-55 (discussing evidence and testimony given by the I.D. Technicians).

Because this case is so fact-oriented and because the majority's decision fails to provide an accurate representation of the record, I have been forced to recite the facts with corresponding record cites, as well as my reasoning and conclusion in detail. My purpose is not to provide a closing argument, as the majority for some reason saw fit to mockingly suggest,[1] but is an honest attempt to persuade my colleagues that the district court's decision should be reversed and set aside and that Anderer should, at the very least, be afforded his day in court in order that he might present his case to a jury of his peers and furthermore that a history of investigative problems of this nature in the Milwaukee Police Department might be exposed to the light of day. *See also Driebel v. City of Milwaukee*, 298 F.3d 622 (7th Cir. 2002).

I. Factual Background

At approximately 7:28 p.m. on April 17, 2001, the Milwaukee Police Department received two telephone complaints, one from James C. Mitchell and the other from Eric Guenther, alerting the police that there was a burglary in progress aboard a boat at 2011 South First Street, the

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[1] See Opinion at *11 n.9.

Pump House Marina (the "Marina"), on Milwaukee's South Side. Officer Anderer, the subject of this case and a 3 ½-year veteran on the Department, was assigned to work without a partner that evening and was dispatched to the crime scene with six other officers: Sergeant Michael Jones, and Officers Jeffrey Cook, Jeffrey Logan, Todd Bohlen, Victor Centeno, and Janice Shoman. These seven police officers, after arriving at the crime scene, and while conducting their investigation, came upon four juveniles (one African-American male, JR, and three white males) that had been observed breaking into a boat parked at a slip in the Marina and stealing a fire extinguisher and high-powered flashlight from aboard the vessel (burglary). Sergeant Michael Jones patted down the suspects and, with the assistance of Officers Jeff Logan and Jeffrey Cook, escorted the juveniles from the boat slip over to the Marina mainland for questioning.

As the officers were escorting the four juvenile burglars, JR became abusive, loud, and obscene and acted out in a most strange and "extremely obnoxious" manner. Cook Aff. ¶ 10. In the presence of Officers Logan, Cook and Anderer, JR began "yelling and screaming [obscenities]," ignored the Officers' commands, and during this time "accus[ed] [police officer Jeffrey Cook] of hitting him in the buttocks with the flashlight and *attempting to rape him*." Cook Aff. ¶ 10-12, 16 (emphasis added); Logan Aff. ¶ 10. When the juveniles reached the Marina mainland they were assembled for further questioning, and "JR . . . [again] accused [Cook] of attempting to rape him" (while possibly experiencing a psychotic episode or hallucination) and "continually screamed that he would get paid, that *he would get a check, and he would have [the police officers'] jobs*." Cook Aff. ¶¶ 12, 16 (emphasis added),[2] implying that he would sue the officers

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[2] JR's insolent behavior was not solely directed at Officer Cook; indeed, the child "call[ed] *all* the police officers at the scene ob-

(continued...)

for money and get them fired from the Department.

After the officers completed their questioning, the four juvenile burglars were arrested, handcuffed and searched. Cook Aff. ¶ 13. Officers Logan and Cook took three of the juveniles into custody, and escorted them to their squad, while Officer Anderer was assigned to escort the fourth individual, JR, to his single-manned squad car (possibly because it would be easier to separate the out-of-control, threatening, and foul-mouthed juvenile from the other three). James C. Mitchell, the citizen witness who had earlier reported the burglary to police, stood nearby and continued to observe Anderer and JR as the officer "guide[d and secured] [him] into the back seat of the squad, . . . [and] close[d] the door to the car . . . ." Mitchell Aff. ¶ 14. Mitchell heard JR continue to scream obscenities directed at the officers and continue to act out in an obnoxious and belligerent manner. Mitchell continued to observe Anderer as he escorted JR to the car, and testified that at no time did he witness Anderer strike the juvenile. Mitchell states in his affidavit that he:

> *[W]atched every step of the way while Officer Anderer was taking [JR] to his squad car* [and as] Officer Anderer guide[d] [JR] into the back seat of the squad, [he (Mitchell)] *saw Officer Anderer seatbelt JR, close the door securing him in the back of the squad* and . . . *[a]t no[ ] time did [he] see Officer Anderer strike [JR] or act in any abusive manner toward him*. . . [Instead, Mitchell observed that] *at all times . . . Anderer acted in a very professional manner [toward JR]*.

Mitchell Aff. ¶¶ 14-16 (emphasis added).

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[3] (...continued)
scene names . . . ." Cook Aff. ¶ 12.

Once Anderer positioned JR into the squad, he (Anderer) left the Marina and proceeded directly to the Second Precinct Police Station, which was only a stone's throw from the Marina (the recorded trip time was only two minutes and two seconds). Anderer Aff. ¶ 43. When Anderer's car arrived at the station, Officer Cook helped unload JR and noticed blood dripping onto the juvenile's chin. Cook Aff. ¶ 26. When Sergeant Michael Jones approached JR and asked why he was bleeding, JR continued his pattern of false accusations and in a flippant and offhand manner (while laughing and joking with the three other children) "point[ed] [at] Officer Anderer [and stated], '[t]hat officer hit me,' and then pointed at [the other officer,] Cook and stated, 'that officer raped me.'" *Id.* ¶ 30. Upon further questioning, and in the presence of Sergeant Jones and Officers Cook and Anderer, JR voiced his claim that Anderer "'hit [him] when he put [him] in the [squad] car.'" Sgt. Michael Jones Aff. ¶ 6. JR went on to allege that *as Anderer was securing him in the squad car*, "he said something to [Anderer]," who "told him 'don't get smart' and [then] hit him one time [on] the mouth and nose [and] g[ave] him a bloody nose and bloody lip." JR's Citizen's Complaint ¶ 5.

As the police were commencing their investigation into the burglary charges against the juveniles (including JR), they became aware of information concerning JR's mental health problems and his history of run-ins with the police. This fully confirmed by that point what should have become clear—*that JR, the juvenile burglary arrestee, was at best a most highly incredible and suspect claimant*. Specifically, police, at this time, learned from JR's mother that her son, on that very day, had failed to take *any of his prescribed drugs* (five or six different prescriptions).[3] Cook Aff. ¶ 35.

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[3] According to Officer Logan, the information that JR was on psychiatric drugs "put everything in perspective," because JR had

(continued...)

And given the type of drugs prescribed for JR, police investigators were well aware that at least two of those drugs, the ones Cook recognized, were used to treat JR's *psychiatric and behavioral disorders*.[4] Moreover, JR's mother made it clear to the officers that these prescription drugs were vital to her son's mental well-being, and she urged the officers to "release[ ] [him] from custody as soon as possible" in order that he might ingest his medication immediately. Cook Aff. ¶ 34. Considering JR's out-of-control, belligerent and obnoxious behavior that night and combined with the revelation that he had failed to take a number (3) of his prescribed psychotropic drugs that very day, investigators should have viewed all of JR's statements with caution and skepticism.

As if this were not sufficient reason to raise a red flag of suspicion and serve to discount JR's false and malicious accusations, the investigating officers, at this time, also became aware that this was not JR's first run-in with the law. Officer Shoman informed the IAD investigators that JR

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[3] (...continued)
not seemed "right" to him "from the beginning[,] as his behavior was way out of line." Cook Aff. ¶ 31.

[4] In fact, *three* of the prescribed drugs JR was taking are used to treat mental disorders: *Paxil (which treats depression, anxiety, and obsessive compulsive disorder, see* "What Does Paxil Treat?", *available at* http://www.paxil.com/about/ab_trt.html); *Seroquel (which treats schizophrenia and which would help control the voices HR was hearing, see* "Understanding Seroquel," *available at* http://www.seroquel.com/cons_asp/undersero/undersero.asp, *as well as symptoms such as hallucinations, see* "About Medications: Seroquel," *available at* http://www.naminys.org/abmed_ser.htm); and *Adderall (which treats attention-deficit hyperactivity disorder, see* "Adderall XR Q&A," *available at* http://www.adderallxr.com/adderallxr_adderallxr.html). *See* Dr. O'Grady (psychiatrist) Report, Anderer Aff. Ex. 30, at 2 (noting that JR was on Paxil, Seroquel, and Adderall).

was a known trouble-maker who had proven to be a *constant problem* in her patrol area. Shoman Aff. ¶ 6. Shoman's account of JR's problems with the law was further corroborated by his own mother, who stated to the officers that she was "not [at all] surprised" that her son had been arrested for burglary. Cook Aff. ¶ 32. The fact that JR had prior runins with the law, and that his mother was not suprised he had been arrested, should have further served to put in question and possibly discredit JR's fabricated story and again cause each one of the officers involved to question the veracity of this psychotic and out-of-control juvenile.

In addition, the complete lack of any physical trauma to JR's face (not one mark, contusion, abrasion, or bruise) fell far short of supporting his allegations that he was punched in the mouth and nose by a 200 lb. male. I.D. Technician David Brown, who photographed JR at 10:05 p.m. that same night (while the police investigation was in progress) noted that the only visible injuries on JR's body were the two cuts inside his mouth (upper and lower lip), which "looked to [be] *nothing more than . . . pre-existing dried[-up] lip[s]* that cracked open just like lips do in the winter," Brown Aff. ¶ 15 (emphasis added) and which JR himself could have intentionally bit open with his teeth. Indeed, Brown stated that, in his opinion, JR's inner lip cuts were "*not caused by a punch*." *Id.* ¶¶ 5, 6. Interestingly, when Brown was subsequently informed that "officer [Anderer] had just been arrested for allegedly punching [JR]," I.D. Technician Brown "*told those [police] officers they must be kidding, [because he (Brown)] had [just] taken pictures of [the] kid [JR] and there were no injuries on JR . . . .*" *Id.* ¶¶ 14-15 (emphasis added).

Kara Kathrein, who had *in excess of nine years experience with the MPD* and *more than three years specializing as an I.D. Tech while on the MPD*, took pictures of JR on the morning of April 18, 2001, at 1:30 a.m. and, like Brown,

testified in a sworn affidavit that the "small cut to [JR's] lower lip" was a "very minor injury" and "*was not consistent with being struck in the face by an adult male*." Kathrein Aff. ¶¶ 14-16 (emphasis added). Moreover, she stated that "*there were no observable injuries to JR other than the cut to his lower [interior] lip.*" *Id.* ¶ 17 (emphasis added). Because Kathrein had such extensive experience photographing and observing victims of abuse (she "ha[d] [previously] taken *many* photographs of injuries caused to victims by battery") and because *she was of the "opinion that the injury JR allegedly sustained was not consistent with being struck in the face by an adult male," id.* ¶ 16, *Kathrein stated that she was "surprised [when she learned] that JR's allegations le[d] to an officer's arrest . . . ." Id.* ¶ 20 (emphasis added).

Also, *it is most interesting and convincing to note that the record is barren of even one report of any finding of any traces of blood or any type of abrasion, bruising, scratches or other evidence of trauma on either of Officer Anderer's hands much less any evidence of blood, tears, dirt, or debris on his uniform or hands*—investigators performed a thorough inspection of Anderer's hands with a high-powered flashlight at Anderer's insistence, and furthermore had ample opportunity to inspect his clothing. *See* Smith Report at 9; Anderer Aff. ¶ 98. Indeed, it was Anderer himself who requested that an I.D. Technician take pictures of his hands to document the fact that they were neither bruised, marked, cut, nor injured in any manner. Anderer Aff. ¶ 81. This request was summarily rejected by IAD Detective Mercedes Cowan, who had arrived at the Second Precinct Police Station just a few minutes earlier with Lt. Hoerig; however, she did examine Anderer's hands with a high-powered flashlight when concluding that he didn't "need a photo tech." *Id.* at ¶ 85-98. Evidence suggesting that Anderer's hands were in pristine condition is consistent with Sergeant Jones' statement to Detective Harrison when he

stated that he had "s[een] *no evidence of any physical fight [between Anderer and JR;] [n]or [any] injury to the juvenile*" at the arrest scene. Jones Aff. ¶ 3 (emphasis added).

In addition, investigators *were aware*[5] that a bystander, citizen James Mitchell, was present on the scene at the time the incident allegedly took place, and was willing, able and available to provide exonerating testimony delineating the professionalism that Anderer exhibited while directing JR to, and placing him in, his squad car. However, *for reasons unexplained, investigators, who had knowledge that Mitchell*

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[5] Both Anderer and Mitchell state in their affidavits that they informed ***numerous*** MPD officers and investigators (at least three, including Sergeant Jones and Detective Harrison) of Mitchell's contact information, and Anderer furthermore informed Detective Harrison exactly the nature and scope of the information Mitchell could provide—namely, that Mitchell *"[had] watched [Anderer] place JR into the squad and could [testify] that [he] did not hit th[e] [juvenile]."* Anderer Aff. ¶ 77 (emphasis added).

Furthermore, since the majority claims to be "puzzled" by my reference to some of the affidavits in the record (noting that these affidavits were "signed after Anderer's arrest"). Opinion at *11 n.9. I must note that time is not wasted at the scene of a police investigation making out affidavits and swearing to the same—particularly in a case such as this, in which the investigators invoked a jet-speed arrest procedure, investigating and proceeding to arrest Anderer with remarkable haste. Nevertheless, all of the observations were made contemporaneously with the events detailed herein and all of the affidavits provided to the court and contained in the record were submitted by duly sworn individuals under oath, and each statement has been signed, sworn and notarized in compliance with the rules and regulations thereof and the MPD.

would exonerate Anderer,[6] *neither conducted an in-person interview of Mitchell nor did they even bother to pick up the phone to call and ask any questions of him at any time prior to Anderer's arrest and confinement. Why?*

Completely disregarding the wealth of factors mitigating against JR's reliability, trustworthiness and honesty, as well as the lack of even a scintilla of proof anywhere in the record that JR had been injured by Anderer, Lt. Hoerig determined there was probable cause to arrest Anderer at the close of her alleged investigation. At this time Hoerig recommended to Chief Jones that Anderer be arrested for child abuse, based exclusively upon her findings, as set forth in her affidavit testimony as follows:

(a) "JR was 12 years old";

(b) "JR was not injured at the time he was turned over to Officer Anderer to be conveyed to the Second District station in Anderer's squad";

(c) "JR was in Anderer's custody exclusively while conveyed to the Second District station";

(d) "JR was handcuffed in the back of Anderer's squad when he was conveyed to the Second District Station";

(e) "JR had injuries consistent with being hit in the mouth when he arrived at the Second District station [sic]";

(f) "JR IDENTIFIED OFFICER ANDERER AS THE POLICE OFFICER THAT HIT HIM IN THE MOUTH";

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[6] *See infra*, pp. 48-49, 57-58, 70-72.

(g) "ANDERER DID NOT EXPLAIN HOW JR WAS INJURED"; and

(h) "Anderer did not report use of force involving JR or any incident involving JR, or any injury to JR"

Hoerig Aff. ¶ 16. However, at least four officers, not including Anderer (Cook, Shoman, Centeno, and Bohlen), two I.D. Technicians (Kathrein and Brown), and one lay witness (Mitchell) came to conclusions that were in stark contradiction to Hoerig's. Indeed, Hoerig also falsely reported that JR had been "serious[ly]" injured, yet Hoerig neither saw fit to have JR evaluated by a medical professional nor to convey the juvenile to a hospital so that he could be treated if necessary (as the MPD rules and regulations and Wisconsin law would have required her to do if in fact JR had truly been "serious[ly]" injured). *See, e.g., infra* p. 71 note 21, and accompanying text.

After Hoerig informed Chief Jones of her recommendation, at 12:30 a.m., without any investigation into JR's obvious and self-evident mental troubles or medical history (of which investigators were on notice), without attempting to solicit statements from any other officers (Centeno or Bohlen—Cook had refused to make any statement without representation, as did Anderer, and Shoman had said she did not witness any fight between JR and Anderer and that JR was a constant problem in her patrol area) or the citizen witness (Mitchell) at the scene, and without even considering seeking the counsel of the DA or his Deputy,[7] Chief

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[7] We again call attention to the fact that, as we noted in *Driebel*, the more desirable practice during criminal investigations involving law enforcement officers is for MPD officials to meet with a representative of the district attorney's office *before* proceeding

(continued...)

Jones went full speed ahead and ordered police detectives Smith and Harrison to place Anderer under immediate arrest. Anderer was then booked, fingerprinted and confined in jail for nearly 12 hours on a malicious (and fabricated) charge of physical abuse of a minor.

Anderer was released without bail at noon the next day without having any criminal charge brought against him. Some sixty days later, in the first week of June 2001, "[Lt. Hoerig] was notified by Deputy District Attorney Jon Reddin that *the case involving . . . Anderer and [JR] would be no processed*[8] *. . . BASED ON THE FACT THAT THE CASE LACKED PROSECUTABLE MERIT*," and, in fact, the criminal prosecution of the case was closed without any misdemeanor or ordinance violation, much less criminal felony, charges being brought against Officer Anderer. *See* Hoerig Aff., Ex. 1001 at 2-3 (emphasis added). Thus, Lt. Hoerig and Chief Jones were both rebuffed by the Deputy DA's decision refusing to bring criminal charges against Anderer.

On June 11, 2001, despite Deputy District Attorney Jon Reddin's outright refusal to charge Anderer with any crime,

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[7] (...continued)
to arrest any officer under investigation—and, at that time, "inquire whether the prosecutor acting independently is likely to press charges against the officer." *Driebel*, 298 F.3d at 645 n.13. This is for the simple reason that "[a]n arrest is rarely made unless charges are likely to be brought." *Id.* Although *Driebel* was decided after the events that gave rise to this case had taken place, we again advocate this procedure in order that the arrest of a police officer, in spite of a complete vacuum of corroborating evidence, may be averted. *See id.*

[8] The formal explanation for this action, "*nolle prosequi*," is the bringing of a motion before a judge on the part of a prosecutor to "voluntar[ily] withdraw[ ] . . . [all] proceedings on a criminal charge." *See* BLACK'S LAW DICTIONARY (6th Ed.).

Chief Jones, not satisfied with that result, saw fit to *re-open and continue* the criminal investigation into JR's false and malicious accusations against Anderer on his own initiative. At this time the Chief, offering a hollow excuse, stated as the reason for continuing his harassment of Anderer that he "wanted to make sure the investigation was complete and . . . the investigating officers had not missed any facts." Jones Aff. ¶ 10.[9] Lt. Hoerig was then instructed by Chief Jones to "re-interview all parties involved in this case." *See* Hoerig Aff., Ex. 1001 at 3 (emphasis added). However, in her summary report after completing the second Anderer investigation, Hoerig stated, upon completing these interviews, that she had failed to turn up "[any] information" to merit "further criminal prosecution" of Anderer. *Id.*

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[9] It is interesting to note that Chief Jones, by his own admission, had forwarded the case to the Deputy District Attorney Jon Reddin *without* having assured himself that he had a complete investigation report before him—for even he himself was *purportedly* concerned that his investigators might have "missed any facts" (In reality, this is an admission by Chief Jones that he ordered the arrest of one of his duly sworn officers in spite of the fact that he had not conducted a complete and through investigation). Jones Aff. ¶ 10.

In any case, Chief Jones's unrelenting insistence on again re-investigating JR's claim for a *third* time—even after the initial police investigation, as well as the Deputy District Attorney's investigation, failed to uncover sufficient evidence to prosecute, and in light of Deputy District Attorney Jon Reddin's previous express refusal to prosecute—was (at best) a *most unusual* occurrence. As a former police officer, Bradley DeBraska, now the president of the Milwaukee Police Association, stated in his affidavit: "this [wa]s the first and only time [he] ha[d] [ever] seen any *police chief restart a criminal investigation after it ha[d] been closed by the District Attorney's office*." DeBraska Aff. ¶ 17 (emphasis added).

Chief Jones—in an obvious last-ditch effort to have Anderer criminally prosecuted (with all his authority as the Chief of Police of a large department) went over the head of the Deputy District Attorney and now personally requested that the District Attorney himself, Mr. E. Michael McCann, review and re-evaluate his Chief Deputy's (Jon Reddin's) prior decision not to prosecute; now, a *fourth (second independent) investigation into the malcontent juvenile burglar and troublemaker JR's fabricated and flippant allegation* ensued. After independently reviewing and considering all of the information, McCann also refused to pursue any criminal charge, and "informed [Jones] that *the District Attorney's office would not change its prior no-charge decision*." Jones Aff. ¶ 12 (emphasis added). In explanation of why he chose to uphold the Deputy DA's (Reddin's) prior decision refusing to prosecute the meritless case, McCann provided Jones "with a copy of a confidential memorandum written by . . . Reddin dated June 7, 2001," *id.*, in which Reddin stated:

> I have interviewed [JR], Anderer, officers Janice Shoman, Jeff Cook and Jeff Logan, and civilian James Mitchell. Based on those interviews *I have concluded that we cannot prove how and by whom [JR]'s injuries were incurred, and consequently [I conclude that] no criminal charges can be sustained*. . . . Whether Anderer struck him or he inflicted the injuries to himself by smashing his face into something in the back of the car will probably never be known to anyone but [JR] and Anderer. I cannot say with any assurance what happened. I believe it more probable, particularly in view of my knowledge of prior complaints against Anderer, that Anderer did strike [JR]. It is entirely conceivable, however, given [JR]'s agitation, mental problems and stated intentions to get money out of this incident, that he inflicted the injuries to himself.

Jones Aff., Ex. 1002 at 1-2 (emphasis added).[10] Thus, after Jones personally requested, on two separate occasions, that criminal charges be filed against Anderer, the chief law enforcement officer in Milwaukee County, District Attorney E. Michael McCann, and his Chief Deputy Jon Reddin *both* found no merit to the charges and declined to prosecute Anderer.

On July 2, 2001, probably to clear his name and reputation, and to save his family from further disgrace and humiliation, Officer Anderer filed a lawsuit against Chief Jones, the IAD and the MPD command officers who investigated JR's claims (Lt. Hoerig, Detective Mercedes Cowan and Deputy Inspector Charles Grisham) for violation of his constitutional rights. Chief Jones (possibly in a retaliatory manner) directed the new commander of the IAD, Steven Settingsgaard, on July 6, 2001, (*a mere 96 hours after Anderer filed his lawsuit*, and approximately a month after District Attorney E. Michael McCann's final decision not to institute criminal charges against Anderer) to institute internal charges against Anderer alleging that he had *violated MPD Rule 4, Section 2/455.00*[11] *on the purported*

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[10] I have reviewed Anderer's complete file in the record and realize that he has a less than exemplary employment history including other instances of alleged suspected misconduct during his career. However, I am of the opinion that it was unnecessary and ill-advised for Reddin to make any reference to past (suspect) complaints against Anderer. I am confident any alleged previous complaints should not be, and were not, a factor in Reddin's decision to prosecute or not to prosecute Anderer. Reddin understood, as I do, that any incidents contained in Anderer's previous complaint file should not have been considered, and have absolutely no bearing on the probable cause issue. *Cf. United States v. Jerez*, 108 F.3d 684, 693 (7th Cir. 1997).

[11] MPD Rule 4, Section 2/445.00 reads: "Members of the police (continued...)

basis that he unnecessarily struck JR on April 17, 2001. This, in spite of the fact that Lt. Hoeirg's second investigation and two independant investigations by the D.A.'s office, one by Deputy District Attorney Reddin and the other by District Attorney E. Michael McCann himself, failed to uncover evidence which would support criminal charges of any kind. In bringing this back-up internal child abuse charge, Chief Jones once again exhibited his unrelenting determination to remove Officer Anderer from the force, and finally succeeded in having him terminated on July 17, 2001.

Given that *four investigations* (two by the MPD's Internal Affairs Divison, one by the Deputy District Attorney Jon Reddin (who concluded that "he could not say with any assurance what happened") and an additional review of the matter by District Attorney E. Michael McCann failed to uncover evidence to sustain any type of felony or misdemeanor criminal charge against Anderer, and considering no person alive witnessed the alleged blow to JR's mouth or nose other than the unruly psychotic juvenile himself, *Chief Jones's continued his unrelenting insistence on getting Anderer off the police force by pursuing a rules violation charge against Anderer was at best a most shocking display of continued harassment and bad judgment. At worst, as the*

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[11] (...continued)
force are strictly forbidden to argue with prisoners, to speak to them unnecessarily, to address them in obscene or profane language, or to threaten them. Members of the police force guilty of unnecessarily striking or manhandling a prisoner or mistreating them in any manner shall be subject to dismissal. A member of the police force having supervision of any police building, bureau or office, to which prisoners are conveyed or in which they are detained, shall be responsible for the proper and humane treatment of such prisoners."

timing of his bringing this charge implies (a mere 96 hours after Anderer filed suit against the MPD), this constituted an example of retaliation reflecting poorly not only on the Chief of the Department, but on each of the individual officers of the MPD who participated in this speedy, lightning-like, careless, and almost pre-determined investigation, arrest and subsequent termination decision. In any case, the questionable conduct during the investigation and filing of the internal MPD rules and regulations charges, resulting in Anderer's dismissal, casts a dark cloud of suspicion over Anderer's initial arrest as well as the entire contrived and orchestrated procedure, and only serves to strengthen Anderer's claim that the MPD's internal investigation into the matter was unreasonable and lacking in good-faith, and that his arrest was not based on probable cause.

II. Analysis

The Rule 56(c) summary judgment standard provides for the granting of summary judgment *only* when "*the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.*" Fed. R. Civ. P. 56(c) (emphasis added); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Said differently, summary judgment is only proper where "a rational trier of fact [could not] find for the non-moving party," here Anderer. *See Wolf v. Northwest Indep. Symphony Soc'y*, 250 F.3d 1136, 1141 (7th Cir. 2001). Of paramount importance in this case is that "[i]n reviewing the propriety of a district court summary judgment ruling under Fed. R. Civ. P. 56, we review de novo and adhere to the same standards as the district court set forth in its memorandum opinion and order." *Dykema v. Skoumal*, 261 F.3d 701, 704 (2001) (internal

citations omitted) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). Also, it is critically important, in the instant case, to recall that "**[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [Anderer's] favor**." *Id.* (citing *Anderson*, 447 U.S. at 255).

A. The District Court's Determination that Probable Cause Existed

It is well-settled that a law enforcement officer has probable cause to make an arrest *only* when "'the facts and circumstances within [his] knowledge and of which [he has] reasonably trustworthy information [are] sufficient to warrant a prudent person in believing the suspect has committed or is committing an offense.'" *United States v. Mounts*, 248 F.3d 712, 715 (7th Cir. 2001) (quoting *United States v. Gilbert*, 45 F.3d 1163, 1166 (7th Cir. 1995)). Keeping in mind that the resolution of a probable cause question "*typically falls within the province of the jury*," *Lanigan v. Village of East Hazel Crest*, 110 F.3d 467, 473 (7th Cir. 1997) (emphasis added), it is appropriate for a court to conclude that probable cause exists as a matter of law only "when *THERE IS NO ROOM FOR A DIFFERENCE OF OPINION* concerning the facts or the reasonable inferences to be drawn from them." *Id.* (emphasis added).

In this case, the trial judge stated:

JR'S STATEMENT ALONE IS AN INSUFFICIENT BASIS FOR PROBABLE CAUSE . . . . ANDERER RAISES SERIOUS ISSUES CONCERNING JR'S CREDIBILITY BY SHOWING THAT JR MADE FANCIFUL ALLEGATIONS AGAINST ANOTHER OFFICER. AFTER ALL, IF JR COULD MANUFACTURE ONE OBVIOUS LIE AGAINST AN OFFICER, HE MIGHT ALSO MANUFACTURE A MORE PLAUSIBLE LIE AGAINST A DIFFER-

ENT OFFICER. WITHOUT MORE THAN JR'S WORD, THEREFORE, ISSUES OF FACT EXIST AS TO WHETHER A REASONABLE OFFICER WOULD HAVE CONCLUDED THERE WAS PROBABLE CAUSE TO ARREST ANDERER. . . .

Anderer v. Jones, No. 01-C-0668, at *6-7 (E.D. Wis., Sept. 30, 2002) (emphasis added). As evinced by this statement, the trial judge found no credence in JR's allegation, as the judge properly recognized that JR's demonstrated propensity to lie rendered his abuse claim against Anderer suspect and untrustworthy. Thus, the trial court concluded that, "*JR'S STATEMENT . . . [WAS] UNRELIABLE*." *Id.* at *9.

In spite of this clear single phrase in the statement of his findings, the district court judge ultimately took an end run around the established facts and proceeded to do a curious flip-flop, somehow holding that there *was* probable cause to arrest Anderer in light of other facts. Specifically, the district court anchored its speculative probable cause finding on "THE BLOOD ON JR'S FACE AND SHIRT . . . AS WELL AS THE TIME IN WHICH ANDERER WAS ALONE IN HIS SQUAD CAR WITH JR, AND ANDERER'S INABILITY TO EXPLAIN JR'S NOSEBLEED." *Id.* at *8 (emphasis added). The trial court found that these circumstances "would have given a prudent police officer probable cause to arrest Anderer." *Id.* I disagree.

I am of the opinion that a consideration of the totality of the evidence available to investigators at the time of Anderer's arrest would have failed to convince a "prudent person" that "an offense" had been committed (that Anderer had hit JR). *See Mounts*, 248 F.3d at 715; *see also Beauchamp v. City of Noblesville*, 320 F.3d 733, 743 (7th Cir. 2003). As discussed *infra*, prior to Anderer's arrest, JR never claimed that he was struck during the time frame he was alone with Anderer in the squad car on the way to the station. Also, I must note that, although the trial judge, in his decision, cited the

blood on JR's shirt as evidence of abuse, *no testing was ever performed verifying that the stains were fresh blood*. Indeed, the I.D. Technicians stated that the blood stains did not look "real fresh" and that "JR's clothing and coat had been soiled and appeared to have been worn for several days." Brown Aff. ¶ 16; Kathrein Aff. ¶ 13. Anderer agreed, stating that JR's "clothes had ground-in dirt and looked very worn." Anderer Aff. ¶ 28. The fact that some of the blood on JR's shirt did not appear "fresh" suggests that JR had been experiencing nose bleeds in the days and hours leading up to his arrest and, thus, the presence of blood on JR's shirt does nothing to advance the theory that Anderer struck the juvenile.

Furthermore, although the district court and the majority made much of the fact that no witnesses observed blood on JR's shirt at the arrest scene, *see* Opinion at *12, it should be made clear that when the officers "first observed JR [at the Marina], [the juvenile] was wearing a hooded jacket with Japanese writing and *WAS ZIPPED CLOSED*." Logan Aff. ¶ 11 (emphasis added). The fact that JR's jacket was zipped closed, as Logan stated, explains why none of the witnesses observed blood, most probably from past nosebleeds, on JR's shirt at the Marina. Therefore, such observations (or the lack thereof) do absolutely nothing to corroborate JR's claim of abuse, contrary to the district court and the majority's contention. *See* Opinion at *12 ("both [Sgt. Jones and Officer Shoman] stated that JR was not bloody at the time he had been turned over to Anderer's sole custody").

Also, any reference to Anderer's "inability" (refusal) to explain the nosebleed suggests that the trial judge must not have been aware of Anderer's right, as a suspect of a criminal offense, to protection under the Fifth Amendment to the United States Constitution which entitles him to refuse to give a statement that might be used against him in a criminal proceeding, nor of his contractual employment

right not to make a statement without a representative present. *See* MPD Manual, Anderer Aff., Ex. B. The record is barren of, and there is no possible explanation by the trial judge, as to why and how he believed Anderer's refusal to give a statement could be used as a prong of the foundation for his finding of probable cause.

B. JR's Lack of Credibility

The majority would like us to affirm the district court's unfathomable and unexplained grant of summary judgment to the Defendants, on the basis that, "as long as a *reasonably credible* witness or victim informs the police that someone has committed, or is committing, a crime, the officers have probable cause to place the alleged culprit under arrest . . . ." Opinion at *8 (emphasis added) (quoting *Spiegel v. Cortese*, 196 F.3d 717, 723 (7th Cir. 2000)). I am forced to disagree with the majority's unsupported contention that JR was a "reasonably credible" witness. The juvenile, JR, under the facts and circumstances set forth herein, could not be classified as reliable or trustworthy, much less reasonably credible. Thus, what the majority fails to take into consideration is that the fictitious claim made by the 12-year-old juvenile in this case—*THAT OF A PSYCHIATRICALLY CONFUSED DELINQUENT JUVENILE ACTING OUT-OF-CONTROL WITHOUT THE BENEFIT OF HIS PRESCRIBED PSYCHOTIC MEDICATION*—was found by the trial judge *"NOT [TO BE] SUFFICIENTLY RELIABLE OR TRUSTWORTHY."* And unlike the majority, I refuse to cast aside and pay no heed to that portion of the trial judge's specific finding that JR was *NOT a reasonably credible witness*; for this (lack of) credibility determination by the trial judge is well established in the record.

Based upon the facts and circumstances set forth herein, it is imprudent and most ill-advised for the majority to rely on the juvenile's complaint and such highly questionable

facts surrounding JR's statements to conclude that probable cause existed to arrest Officer Anderer. *See* Opinion at *10. I understand that, generally, the "complaint of a single witness or putative victim alone [is] generally . . . sufficient to establish probable cause," EXCEPT IN THOSE INSTANCES WHERE THE "COMPLAINT [BY ITSELF] WOULD LEAD A REASONABLE OFFICER TO BE SUSPICIOUS," for in those cases "THE OFFICER HAS A FURTHER DUTY TO INVESTIGATE." *Beauchamp*, 320 F.3d at 743 (emphasis added). As this Court explained in *Hebron v. Touhy*, 18 F.3d 421 (7th Cir. 1994):

> *Sometimes information from or about a person claiming to be the victim of crime would lead a reasonable officer to be suspicious*, making further investigation prudent—and, because the "reasonableness" standard of the fourth amendment links the constitutional obligation to the standard of prudent conduct, *the officer must do more.*

Id. at 422-23 (emphasis added). Therefore, I must point out that while I fully understand that "'the law does not require that a police officer conduct an incredibly detailed investigation at the probable cause stage,'" *Spiegel*, 196 F.3d at 724-25 (quoting *Gerald M. v. Conneely*, 858 F.2d 378, 381 (7th Cir. 1988)), certainly in the investigation of a situation such as the one presented to us, which could and did result in a grave injustice—Anderer's arrest (and his ultimate termination from the police force), an investigating officer *"SHOULD CONDUCT FURTHER INVESTIGATION" especially when he or she is aware of certain "information from or about a putative victim of crime [that] WOULD LEAD A REASONABLE OFFICER TO BE SUSPICIOUS."* *Id.* at 724 (emphasis added).

The record establishes that the investigating officers possessed *more than ample* information that would and should have led a well-trained and competent officer, ex-

ercising reasonable judgment based upon the knowledge he or she possessed, to be *suspicious* and *most cautious* of young JR's fabricated allegation of abuse. This, in turn, *should have mandated that the officers go forward and perform a good-faith investigation in an unbiased, fair and objective effort to satisfy the probable cause standard*. However, there is no evidence in the record that IAD officers were cautious or suspicious, much less objective; for they never even took the simple step of checking JR's juvenile court contact record, but instead accepted JR's fabricated allegations at face value. As noted above, JR was shouting obscenities and threats, as well acting in an out-of-control and very strange manner on the night of the incident, for in addition to off-handedly remarking that Anderer had hit him in the mouth, JR *repeatedly stated, in front of a number of other police officers, that Officer Cook had raped him (possibly hallucinating), and repeatedly inferred that he would sue ("get money") and get the arresting officers, including Cook and Anderer, fired*. The mentally disturbed JR (who had not ingested his psychiatric medication that day) had a clear motive to make up a malicious lie in order to "harm others" and get Anderer and Cook in trouble, and thus was unworthy of belief concerning his "rape" allegation against Cook and his abuse allegation against Anderer. Again, as the trial judge aptly found, "if JR *could manufacture one obvious lie against an officer, he might also manufacture a more plausible lie against a different officer.*" *Anderer v. Jones*, No. 01-C-0668, at *7 (E.D. Wis., Sept. 30, 2002) (emphasis added). As I stated earlier, I wholeheartedly agree with that part of the district court's finding and statement that JR's allegation of abuse does fall far short of fulfilling the good-faith standard required to establish probable cause.

Also, the majority's contention that "JR told several police officers the same story," Opinion at *9, is inaccurate and misleading; for the record reveals the contrary, *i.e.*, that JR

was *neither* truthful nor forthcoming with the IAD investigators about his previous rape allegations against Cook. At the Marina, the scene of the burglary, after JR had been apprehended by Officer Cook, he began "screaming and yelling and accusing [Cook] of attempting to rape him." Cook Aff. ¶ 11. JR also continued his barrage of obscenities and threats by stating that Cook was a "f***ing pig and I'm going to get you." Hoerig Aff., Ex. 1001 at 25. Once again, after JR had been transported to the Second Precinct Police Station, JR again accused Cook by pointing at him and stating "that officer raped me." Cook Aff. at ¶ 30. However, once the investigation into the allegations against Anderer commenced, at no time did JR repeat this absurd and ridiculous rape allegation to IAD investigators. Instead, JR only stated to them that Cook *"nudged him on his buttock with a flashlight."* Smith Report ¶ 5 (emphasis added). *This statement (that Cook had "nudged" him in the buttock) was in all likelihood more "true" than JR's "obvious lie" that Cook raped him, but it does not support the majority's conclusion that* "JR told several police officers the same story . . . ." Opinion at *9. Moreover, even if JR *had* repeated his prior rape statement to the investigating officers—rather than *restore* his credibility, *the juvenile's willingness to repeatedly make a specious rape claim against police officers (which the district court judge termed as an "obvious lie"), if anything, would have served to further diminish JR's credibility concerning his concomitant child abuse allegation*.

As for the very powerful evidence that JR was presently, and in the immediate past had been, undergoing treatment for psychiatric and behavioral problems which necessitated the prescription of a myriad of psychotropic drugs—*and that he had failed to take his medicine on the day in question (the very day he participated in the boat burglary, levied false allegations of rape and abuse against Cook and Anderer, made numerous threats of harm against the arresting officers and somehow ended up with a bloody nose and accused a police*

officer of causing it) should have raised the red flag of caution and suspicion for investigators—the majority says only that "the fact that the investigating officers knew about JR's psychiatric medication does not *ipso facto* negate JR's credibility or require the officers to further investigate JR's medical history to substantiate or refute his claim of abuse by Anderer." Opinion at *11. No one says now, or at any time, that this one fact alone would even be sufficient to refute the abuse claim. Surprisingly, in an attempt to support their assertion, the majority relies on this Court's holdings in *Dreibel v. City of Milwaukee* and *Spiegel v. Cortese*. *See* Opinion at *11. But *Dreibel* is wholly inapposite, for in that case (unlike the instant case), the purported victim's allegation that he was struck by a police officer was bolstered by "*numerous witnesses* who [were allowed to] g[ive] [more than] sufficient corroborating testimony to establish that [the police officer] may have committed a battery . . . ." *Dreibel*, 298 F.3d at 644 (emphasis added). Yet, in this case, not one living, breathing individual corroborated JR's allegations of abuse. *ARE WE REALLY TO BELIEVE THAT ANDERER, ALL FOUR OF HIS FELLOW OFFICERS (WHO WERE ON THE SCENE) AND MITCHELL ARE ALL LIARS?* Moreover, there was absolutely nothing to interfere with the MPD and Chief Jones from waiting a few days, or even weeks, while they pursued their investigation and gathered sufficient evidence about the allegation. At the very least they should have consulted with the independent senior law enforcement officer of the county, *i.e.*, the D.A. or his representative, before taking the most serious step of subjecting Officer Anderer to arrest (as is the department's *modus operandi* for an investigation into an alleged crime with accompanying serious consequences), confinement and ultimate discharge.

The majority's reliance on *Spiegel* is likewise inappropriate, for the complainant in *Spiegel* was found to be reasonably credible, despite "inconsistent" statements to officers.

See Opinion at *11; *Spiegel v. Cortese*, 196 F.3d 717, 724 (7th Cir. 2000). By contrast, in the case before us, the police had available to them a *plethora* of evidence, beyond that of merely "inconsistent" statements to authorities, establishing beyond doubt that JR was unbelievable and untrustworthy: (1) he had made a false allegation of rape— an "obvious lie"—against Officer Cook at the same time he accused Anderer of abuse; (2) he had expressed a clear and unambiguous intent to sue and make money off of his arrest and to "have the arresting officers' jobs"; (3) he was supposed to be ingesting five or six prescription drugs each day—including three (Paxil, Seroquel, and Adderall) which treat mental and behavioral deficits (schizophrenia, generalized anxiety disorder, attention deficit disorder, etc.)—and he had not taken his medication that day; (4) he had a history of delinquency, was a "constant problem" on Officer Shoman's beat, and furthermore his mother was "not surprised" that he was arrested for burglary; and (5) there was not one noticeable sign of physical abuse on his body, much less evidence that would suggest he had been punched in the face or nose, *i.e.*, there were no marks, bruises, cuts, abrasions or lacerations on the boy's face or nose, except the two small cuts on the *inside* of his lip; which more likely were from sources other than an alleged punch from a 200 lb. male to the facial area.[12] I am convinced that the very nature of this evidence should have led "a reasonable officer to be suspicious." *Hebron*, 18 F.3d at 422-23. *The combination of these factors, when considered in their totality* should have severely undermined and/or destroyed the validity of JR's fabricated and malicious statements, as reflected in *the*

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[12] The majority's characterization of JR as having "split lower and upper lips" is highly inaccurate. Opinion at *9. Furthermore, it defies logic to suggest that a reasonable person would conclude that JR had been punched in the face when, although there were minor cuts on the *inside* of the juvenile's mouth, there were no corresponding cuts, contusions, lacerations, swelling or any other sign of impact on the *outside* of JR's face, nose or mouth.

district court's finding that JR's previous "fanciful allegations against [Officer Cook]" raised "*serious issues concerning JR's credibility*." *Anderer v. Jones*, No. 01-C-0668, at *7 (E.D. Wis., Sept. 30, 2002) (emphasis added).

While I am well aware, and agree, that the law does not require investigating officers to "exclude *every* suggestion that a victim is not telling the truth" prior to making an arrest, *Spiegel*, 196 F.3d at 724 (emphasis added), the facts and circumstances of this case *most certainly* would have "le[d] a reasonable officer to be suspicious" and most cautious of his claims. *Beauchamp*, 320 F.3d at 743. Under these conditions, where investigating officers knew that the position of an officer who had been employed by the Department (3 ½ years service on the force) was in jeopardy, and that the claimant was an incorrigible, malcontent, out-of-control psychotic juvenile, JR (12 years of age), who made what may best be characterized as flippant and offhand accusatory statements[15] that he had been hit by Anderer and raped by Cook; can the majority really argue on legal grounds that the investigators did not have a duty to do more investigating into the juvenile and his statement? I think not. I am therefore at a loss to understand the majority's conclusion that JR was a reasonably credible witness and that no further investigation into his allegation was necessary, which is in sharp contrast with the credibility findings of the trial judge, as well as my personal appraisal. *See* Opinion at *8-10 (citing the "reasonably credible wit-

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[15] Officer Logan testified that just before JR made his allegation, i.e., pointing at Anderer and stating "that officer hit me," JR and the other juveniles were seated at a table in the garage and while Logan "was watching the juveniles at the table, they were all laughing (including JR) about their situation. Therefore, despite the implication by the majority that JR made his claims against Anderer in a sober and reflective manner, JR was actually just continuing his laughing, joking, boisterous and out-of-control behavior when he implicated Anderer.

ness" standard, and refuting "Anderer['s] claim[ ] that JR was not a credible victim . . . .").

C. Lack of Evidence Corroborating JR's Claims of Abuse

As clearly portrayed in the photographs taken immediately after the alleged assault as well as the reliable affidavit testimony of officers that examined JR (Officers Logan and I.D. Techs Brown and Kathrein), there wasn't one scratch or bruise nor any type of abrasion, contusion or blemish on the outside of JR's face, nose or mouth. In spite of this, the majority attempts to lend credence to the trial judge's speculatory statement (*i.e.*, that "J.R.'s statement that Anderer hit him was consistent with the blood on J.R.'s face and shirt"). In doing this the majority evidently relies on JR's bloody nose and dirty and worn shirt, as well as two cuts on the inside of his mouth and upper lip, *see* Opinion at *10, to somehow validate JR's (otherwise unbelievable) story and relieve the police from performing a reasonable investigation into the validity of his delusionary claim of abuse. In so doing, the majority completely casts aside any and all exonerating testimony from the citizen witness (Mitchell) and *six police officers* (two of whom clearly stated they did not see any physical confrontation between Anderer and JR, and four of whom stated no such confrontation took place). *See* Opinion at *12. The majority also somehow sees fit to ignore the sworn affidavit testimony and exhibits (photographic renditions of JR), *see* Opinion at *12-13, submitted by the trained and knowledgeable I.D. Technicians, David Brown and Kara Kathrein, who concluded that JR's lip cuts were most likely due to "a pre-existing condition" and that *they did not appear to be "caused by a punch . . .*," Brown Aff. ¶ 5, 6; *see also* Kathrein Aff. ¶15, and which instead could more likely have been caused by JR biting his inner lip or as a result of a dried out mouth condition and a canker sore. Indeed, Brown claimed—and we must accept as true his statement—that "th[e] injury was so minor that it was not worth taking a picture of except for the purpose

of being able [to] identify in the future the exact extent of the alleged injury [JR]" referred to. Brown Aff. ¶ at 6. As Kathrein maintained, the "*small cut appeared [to be a] bit[e] [to the inner] lip or . . . a canker sore," rather than an injury caused by a "punch to his face.*" Kathrein Aff. ¶¶ 15, 16 (emphasis added).

The majority attempts to cast to the winds and dismiss the photographs and affidavit testimony submitted by the I.D. Techs' out of hand, on the purported basis that "one ID tech did not photograph JR until *after* Anderer had already been arrested, and so would have had nothing to contribute to the probable cause determination prior to his arrest." Opinion at *13. This statement is also inaccurate, for the fact remains that I.D. Technician David Brown *did take* the photographs of JR well *prior to Anderer's arrest*—photographs taken at 10:15 p.m.—*a full two and a half hours before Anderer's 12:35 a.m. arrest*. The majority also criticizes the time frame during which these photographs were developed by stating that the "photographs [of JR] . . . were not developed until *after* Anderer's arrest." Opinion at *11. The question naturally arises: are photographs usually taken and DEVELOPED at the very scene of a crime of this nature? I think not (at least not before the advent of digital cameras which, at the time, were not carried by police officers).

Furthermore, although the photographs were not developed until post-arrest, the majority's argument that they are thus irrelevant is a red herring.[14] *See* Opinion at *13. These

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[14] I take issue with the majority's description of the statements made and photographs taken by the I.D. Techs as "irrelevant facts which have no bearing on what the officers reasonably knew when they arrested Anderer." Opinion at *11, n.9. Although I agree that at the time of arrest these facts may have been irrelevant on their own, they do demonstrate that the IAD's assessment of the evidence in this case was unreasonable and that further investiga-

(continued...)

photographs *are relevant* to the probable cause inquiry because the developed negatives support the determination of ID Technician David Brown that *the cut on JR's inner lip was the result of a "pre-existing condition" such as a "dried-up[] lip" or "canker sore" and thus did not appear to be "caused by a punch."* Brown Aff. ¶¶ 5, 6; Kathrein Aff. ¶16. Furthermore, the majority fails to recognize that David Brown's determination that JR's "injuries" were *not consistent* with abuse *was made well before Anderer's arrest* (at 10 p.m., two hours prior to Anderer's arrest). Thus, both the pictures of JR's lips before and after the arrest, and the testimony of the I.D. Technicians who took them, support the conclusion that *JR's injuries were not consistent with a punch to the face from a 200-lb. man and, thus, casts grave doubt on Chief Jones's and his command officers' decision to place Anderer under arrest for abuse* and Officer Hoerig's less than forthright statement that the cuts on JR's lips were either "serious" in nature or consistent with abuse. *See* Hoerig Aff. ¶ 16.

Additionally, *contrary to the majority's contention, although the other I.D. Technician, Kara Kathrein, took pictures of JR approximately an hour after Anderer's arrest, her stated observation that JR's lip cut "was not consistent*

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[14] (...continued)
tion was warranted because JR's alleged "injuries" were not serious enough to make his allegations of being hit by a 200-lb. police officer reasonable. *See supra* pp. 47-55. In addition, when viewed in the light of all of the other factors which made JR an unreliable witness (such as: (a) his out-out-of-control behavior; (b) his failure to take his medication; (c) his propensity to make up allegations about other officers, *i.e.*, stating that Cook "raped him"; and (d) the lack of one bruise, scratch, abrasion or laceration on his face or nose) the ID Tech's pictures and statements give us a clear picture of what the situation was that night, and the shocking lack of good-faith and judgment the IAD used when the proceeded to arrest Anderer on these utterly baseless and unreasonable charges. *See infra* pp. 43-44, 52-54, 81-85.

with being struck in the face by an adult male," Kathrein Aff. ¶ 16 (emphasis added), *is certainly relevant to the reasonableness of the probable cause determination, since Kathrein's observations of JR were very proximate in time to Anderer's arrest.* See Opinion at *13. Again, the majority appears to misconstrue Anderer's argument regarding the importance of the I.D. technicians' observations that the "injuries" referred to were inconsistent with a punch. The *majority* states in its opinion that I.D. Technician Brown's and Kathrein's accounts of JR's injuries on the night of his arrest are irrelevant because police officers "themselves regularly investigate batteries against persons and are capable of assessing the nature and possible cause of injuries" and, thus, there was no reason "these ID techs should have been consulted by the officers investigating JR's claims prior to arresting Anderer." Opinion at *12-13. Might I make clear that I am not arguing that the investigating officers were under any duty, much less an obligation, to ask the I.D. Technicians for their opinions before reaching their determination that the injuries were or were not caused by Anderer. Instead, Anderer argues (and I agree) that the observations of these QUALIFIED EXPERTS who personally observed, witnessed and photographed JR's alleged lip lacerations after he arrived at the station—and, more specifically, their *opinion* that the condition of JR's lip injuries were *inconsistent* with the allegations of abuse—*are relevant in determining whether Lt. Hoerig's assessment of the juvenile's injuries to the contrary was reasonable or credible. It was not*. Just as there is no requirement that investigators consult with I.D. Technicians about the possible cause of injuries to an alleged victim, neither is there any requirement that an individual get a second opinion when diagnosed with a malignant brain cancer which requires surgery; however, such an opinion is often helpful and instructive and could very well inform the initial examining doctor of something he or she may have overlooked. After all, two minds, especially those specifically trained and possessing a great amount of experi-

ence, are frequently considered more convincing and helpful than one.

It was illogical and indicative of incredibly poor judgment for Hoerig and the IAD investigators to cite JR's "injuries"—including his inner lip cuts—as evidence supporting their decision that there was probable cause to arrest Anderer for abuse of a child without a scintilla of evidence as to any bruise, abrasion, blemish, contusion or laceration to JR's outer facial area consistent with the juvenile's flippant and offhand accusation that he was punched in the face and mouth by a 200-lb. man while entering the squad car. There is no evidence in the record that JR's inner lip cut had changed in appearance (improving or worsening) in the short space of time between Hoerig's examination of JR (approximately 9:15 pm), Brown taking his photographs (10:15 pm), Anderer's being arrested (12:30 am) and the time at which Kathrein took her photographs (1:30 am).[16] Thus, as I have pointed out earlier, viewing the facts in a light favorable to Anderer, as we must at this stage of the proceedings, veteran officer Kathrein's observations that JR's inner lip cuts resembled "pre-existing" canker sores or a "bitten lip" causing bleeding were, contrary to the majority's contention, *highly relevant* to the probable cause inquiry. *See* Opinion at *13. This *evidence casts serious doubt on Lt. Hoerig's most questionable and unfathomable determination that "JR['s] [lip] injuries [were] consistent with being hit in the mouth*," Hoerig Aff. ¶ 16 (emphasis added), and thus

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[16] Because there is no evidence that the injury changed in appearance between the time when Lt. Hoerig examined JR and when Kathrein took her photographs, Kathrein's opinion that the cut was "very minor," there was "no bruising on his face . . . [h]e did not have a swollen or fat lip," "he had no visible signs of injury," and thus his condition was "not consistent" with a punch (formed at the time she took the photographs) should be considered as evidence that the alleged wound was *not* consistent with JR's allegation of abuse. Kathrein Aff. ¶16; *see* Hoerig Aff. ¶ 16.

also serve to undermine Hoerig's careless and unsupported judgment that there existed probable cause to arrest Anderer.[16] Did this constitute a good-faith probable cause inquiry? The answer is NO. Thus, I reiterate that the statements of the I.D. Technicians, which are contrary to those of Hoerig and the IAD investigators, were *highly relevant* when considering the question of whether there was probable cause.

It is obvious that Anderer's arrest, which the district court and the majority have seen fit to uphold as supported by probable cause, was at least in part predicated on Lt. Hoerig's recommendation to Chief Jones that probable cause existed. *See* Opinion at *8-9. This is in spite of the fact that no living person interviewed either before or after the Anderer's arrest could corroborate JR's claims of abuse. For example, Officers Michael Jones and Jeffrey Logan testified that they had no idea what caused the alleged in-

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[16] Over and above Brown's and Kathrein's testimony regarding JR's injury, the photographs themselves (true and accurate representations of the condition of the juvenile's facial area after reaching the police station) reflect only a minor laceration on the inside of JR's bottom lip and a slight blemish inside the upper lip—the type of blemishes that would be consistent with and which would be more likely attributable to any number of other factors, such as JR biting his lip or canker sores caused by a dry-mouth condition associated with, and intensified by, the combination of the myriad of medications JR had been ingesting. *See* David Dunplay, et al., PHYSICAN'S DESK REFERENCE 1587 (58th ed. 2004) (giving the incidence of dry mouth associated with Paxil, just one of the medications JR was taking, as about 18% in clinical trials). Importantly, the photographic evidence as well as the ID Tech's testimony, establishes the fact that there was *no swelling, bruising, redness, trauma or abrasions of any kind* anywhere on the juvenile's facial area, which one would observe on a child who has been hit by a 200-lb. man. *See* Brown Aff., Exh. 1000; *see also* Kathrein Aff., Exh. 1006.

jury to JR. In addition, as outlined above, I.D. Techs Brown and Kathrein testified as to the lack of any bruise, blemish, abrasion or laceration on JR's face or nose and to the fact that JR's "injuries" were not consistent with being punched in the mouth or nose by a 200 lb. man. Also, as set forth *infra*, Officers Shoman, Centeno, Cook, and Bohlen, as well as the lay witness, Mitchell, testified that they did not witness any altercation whatsoever between Anderer and JR, contrary to JR's allegations. In conjunction with the testimonial evidence, the pictures taken both before and after Anderer's arrest do not corroborate JR's story. Rather, these photographs and statements establish that there were no cuts, bruises, abrasions, lacerations, contusions or other signs of trauma to JR's face which might tend to give some credence to his claim that Anderer had punched him. Thus, when all the facts and circumstances in the record are viewed in the light most favorable to Anderer as the law requires us to do at this stage of the proceedings, I remain convinced that probable cause was not established and, furthermore, that it was unreasonable for Lt. Hoerig to deduce, for the district court to speculate, and for the majority to similarly conclude, that Anderer "had committed . . . an offense." *Spiegel*, 196 F.3d at 723 (quoting *Qian v. Kautz*, 168 F.3d 949, 953 (7th Cir. 1999)).

D. Anderer's Fifth Amendment and Contractual Rights

More importantly, THE MPD'S PROBABLE CAUSE DETERMINATION, AS WELL AS THE DISTRICT COURT'S FINDING AND THE MAJORITY'S OPINION RATIFYING THAT DECISION, leave a great deal to be desired insofar as each one of them rely on Anderer's "TOTAL FAILURE TO PROVIDE ANY EXPLAINATION FOR THE INJURIES" AS A "CIRCUMSTANCE" SUPPORTING JR'S CLAIM OF ABUSE. Opinion at *10 (emphasis added). After all, Anderer properly invoked his lawful contractual

right—which is protected by his employment contract with the MPD—not to give a statement without representation present while he was under investigation for a crime. In addition, like any other citizen of the United States, including law enforcement officers, Anderer had every right to refuse to make any statement that could be used against him in a criminal proceeding under the Fifth Amendment to the Constitution.

As to his contractual rights, the MPD Rules and Regulations set forth that:

> In investigations that require an immediate interview, the member will be allowed a reasonable opportunity to obtain the presence of and to *consult with a representative of his/her choice before and during the interview.* If a representative of the member is not readily available and if the supervisory officer determines that it is necessary to immediately continue the interview to complete the investigation, the supervisor shall consult with the Commanding Officer of the [IAD] prior to the continuation of such an investigation. If any member being interviewed by a supervisory officer requests representation, and that representation is denied, the supervisory officer shall prepare an In the Matter of Report indicating the circumstances which led up to the request for representation and the reason why the representation was denied.

MPD Rule 3/450.05(D)(8) (emphasis added). Additionally, I must note that, according to the MPD Rules and Regulations which were received into the record as evidence, an officer can be compelled to answer questions posed by an investigating supervisory officers only when, prior to the interview, the officer IS GRANTED IMMUNITY and advised that any answers to questions presented and responses made thereto "and the fruits thereof, cannot be used against [him]

in any criminal proceeding." *See* MPD Manual §3/450.05(D)(5); *see also Driebel*, 298 F.3d at 638 n.8. At no time was Anderer offered immunity and he was never compelled to give a statement, nor was he provided with a union representative as he demanded, because he was arrested shortly thereafter. However, IAD officers did attempt to coerce a statement from him in complete disregard for their own regulations. Detective Harrison "asked if [Officer Anderer] would give a statement," and Anderer told Harrison, "absolutely not, not without union representation." Anderer Aff. ¶¶ 71, 72. Also, Detective Harrison, who, as an acting MPD command officer (and like every other MPD officer), is sworn to uphold the laws of the State of Wisconsin and the ordinances of the City of Milwaukee, then proceeded to blatantly threaten Anderer when stating that she was "going to get a sergeant [t]here to [do a] PI-21." *Id.* at ¶¶ 73, 74. This meant she was going to get a sergeant to compel and force Anderer to give a statement under threat of demotion, disciplinary action or even discharge. *See* MPD Rule 3/450.05 et seq. What was not stated to Anderer was that any statement that might have been given as the result of a PI-21 could not be used against him in any criminal proceeding. As it turned out, Harrison and the IAD investigators had no intention of ever "PI-21ing" Anderer because their goal throughout this pre-ordained and result-orientated process was to arrest him, therefore, the speedy arrest process continued while Anderer remained silent.

It is interesting to note that, at this time, before his arrest and after her threat to compel him to speak, Anderer did speak to Detective Harrison "off of the record . . . ." Anderer Aff. ¶ 75. Anderer asked Harrison what he was going to be charged with and, according to Anderer she responded: "That's what doesn't make any sense. He's accusing you of *PUNCHING HIM WITH THE BACK OF YOUR HAND AND THE KID HAS NO INJURIES OTHER THAN A SMALL CUT ON THE INSIDE OF HIS LIP, WHICH YOU CAN BARELY SEE, AND*

WHICH IS NOT CONSISTENT WITH A PUNCH." *Id.* at ¶ 76 (emphasis added). Anderer then gave the eyewitness James Mitchell's address and phone number to Harrison and watched as she transcribed this information in her notebook, trusting that he (Mitchell) might be contacted to corroborate Anderer's lack of involvement in the alleged incident. *Id.* at ¶77-78. Anderer also asked Harrison if Officer Cook was going to be charged with rape, and Harrison replied that Cook was not going to be charged and that he (Anderer) was the sole target of the investigation. *Id.* at ¶79. Anderer responded by saying "that's bullshit, I'm 200 pounds, if I would have punched that kid, I would have left some brusing or swelling on his face, and would have cuts or redness on my hands . . . ." *Id.* at ¶ 80. Anderer then requested that JR be taken to be "medically cleared" (or examined by a medical professional). *Id.* In addition, Anderer displayed his hands to the detectives, which Harrison examined, and at that time he (Anderer) requested that his hands be photographed. *Id.* at ¶80-81. Harrison told Anderer that the I.D. Technician had left, but she later reassured him that "WE KNOW [ALL OF] THESE COMPLAINTS ARE BULLSHIT . . . WE ARE GETTING TIRED OF INVESTIGATING FALSE ACCUSATIONS."[17] *Id.* at ¶ 81-82 (em-phasis added). A few minutes later, Anderer once again requested that photographs be taken of his hands. *Id.* at ¶ 94. Instead, Harrison's superior, IAD Detective Mercedes Cowan, exam-

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[17] In a curious and unexplained about-face Detective Harrison subsequently changed her story and, now playing in tune with the Jones orchestra, told Lt. Hoerig that she believed JR's story and that, in her opinion, there was probable cause to arrest Anderer. Harrison Aff. ¶ 21. Whether Harrison was playing good-cop/bad-cop or she was pressured by Hoerig and officers above her to go along with her (Hoerig's) verison of events is unknown. *However, assuming Harrison's statements to Anderer were truthful (i.e., that she thought JRs complaint was false) she did not believe there was probable cause to arrest Anderer*.

ined Anderer's hands with a high-powered flashlight and stated "you don't need a photo tech." *Id.* at ¶ 98. Photographs never were taken of Anderer's hands nor was the pristine and unblemished condition of his hands ever noted in the record, and, as noted above, the MPD "fast-track" arrest process resulted in Anderer being arrested shortly thereafter. Was this blatant declination of his request for photographs of his hands an example of good-faith and fairness? I think not.

Furthermore, in their haste to arrest, confine and humiliate Anderer, the MPD went so far as to ATTEMPT TO HAVE ANDERER BOOKED AND JAILED IN HIS POLICE UNIFORM, apparently in an effort to further demean him. However, the Milwaukee County Sheriff's Department officers, in an exercise of good judgment, refused to admit and accept Anderer into the Criminal Justice Facility (county jail) dressed in his police uniform, and sheriff's officers directed that he change into his street clothes. Thus, following the IAD's rush to judgment, Anderer was seized and arrested *and, to add insult to injury, was very close to being subjected to further ridicule, and possible physical harm, by almost being jailed in his police uniform (there being little affection between prisoners and law enforcement personnel)*.

As mentioned above, under his employment contract with the City of Milwaukee Police Department (specifically, MPD Rule 3/450.05(D)(7)), Anderer was entitled to "have a representative of [his] choice present" during questioning; thus he was fully justified in relying on his *CONTRACTUAL RIGHT TO REFUSE TO ANSWER QUESTIONS, SPECULATE OR ATTEMPT TO PROVIDE ANY TYPE OF EXPLANATION AS TO WHEN, WHY AND HOW JR SUFFERED THE NOSEBLEED*. The fact that "Anderer made no comment or report concerning how JR [might have been] injured," Jones's Br. at 20, could not and *should not* have been held against him. *Also, by no stretch of the imagination, could Anderer's refusal to speculate as to the cause of JR's alleged injuries be considered a factor in establishing probable cause to arrest him for abuse (pursu-*

ant to his Fifth Amendment right not to incriminate himself). Nevertheless, the district court, without a scintilla of precedential support, exhibited faulty reasoning and SPECULATED THAT ANDERER'S LACK OF "EXPLA[NATION FOR] THE CAUSE OF JR'S BLOODY NOSE" could be considered a "factor[ ] sufficient to supplement any lack of credibility in JR's statement[s]." *See Anderer v. Jones*, No. 01-C-0668, at *11 (E.D. Wis., Sept. 30, 2002) (emphasis added). Even more unfortunate is that my colleagues in the majority readily adopted this unsound rationale, without any support in the law, holding and stating that:

> Given these circumstances—a 12-year-old's injuries and bloody appearance, his consistency in reporting how he had been injured, and *Anderer's total failure to provide any explanation for the injuries* when no other officer observed JR in that condition prior to turning him over to Anderer's sole custody—*we believe that Milwaukee police officers had probable cause* to believe that Anderer had intentionally or recklessly caused JR's bodily injury.

Opinion at *10 (emphasis added). The majority's mysterious use of Anderer's refusal to give a statement as a premise on which to base their determination of probable cause, is unsupported with any case law and rests on a foundation of quicksand.

The district court's, as well as the majority's, willingness to rely on Anderer's refusal to give a statement as an essential prong of the "evidence" establishing probable cause to arrest him for a crime is particularly troubling when one considers and reflects upon *over 200 years and volumes of precedent in case law supporting Anderer's Fifth Amendment right protecting him against self-incrimination*. IT IS INDEED "WELL-SETTLED . . . [THAT] '[P]OLICEMEN . . . ARE NOT RELEGATED TO A WATERED-DOWN VERSION OF CONSTITUTIONAL RIGHTS.'" *Driebel*, 298 F.3d at 637 (quoting *Garrity*, 385

U.S. at 500) (emphasis added). And the Fifth Amendment's self-incrimination protections, which prevent the "government [from] forc[ing] a person to make a statement, even out of court, that might be used as evidence that he had committed a crime," *Atwell v. Lisle Park Dist.*, 286 F.3d 987, 990 (7th Cir. 2002), are well-established. *Id.* Thus, I am at a loss to understand how the MPD, the district court, and now the majority include Anderer's proper and justified exercise of his well-established Fifth Amendment right to refuse to give a statement which might incriminate him (in addition to his separate and distinct contractual right not to give a statement absent representation) as a factor in satisfying the probable cause standard. After all, a person "may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal . . . to answer does not, *without more*, furnish those grounds," *Florida v. Royer*, 460 U.S. 491, 497-98 (1983) (emphasis added)—*much less can a refusal to answer potentially incriminating questions ever be construed as constituting an element of the probable cause requirement to arrest*.

Again, I am well aware that according to MPD Rules, and consistent with the law, a police officer who is under investigation in matter which may result in a criminal proceeding *may* be compelled to give a statement during an investigation—but NOT UNTIL SUCH TIME AS HE HAS BEEN GRANTED IMMUNITY FROM CRIMINAL PROSECUTION IN THE MATTER UNDER INVESTIGATION. *See Driebel*, 298 F.3d at 638 n.8; *accord Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977). This was obviously not the case here (because Anderer was never compelled to give a statement), and so this exception has no bearing on Anderer. Nonetheless, considering Anderer's contractual employment right, as separate and distinct from his Fifth Amendment rights, the MPD's concerted effort to compel a statement absent representation (even by threat)—and then to make use of his lawful refusal to comply without the requested repre-

sentative present as a basis for probable cause—is clearly violative of his contractual employment rights, as well as his well-established constitutional rights to refuse to answer.

Indeed, in the context of a lawful *Terry* stop (an investigatory questioning supported by reasonable suspicion)—which may be the most analogous situation—*the question of whether an investigating officer may detain an individual for refusing to answer a potentially incriminating inquiry, or whether he may use such refusal to elevate his mere suspicion to the level of probable cause, is an issue neither the U.S. Supreme Court nor this Court has resolved to date*. *See, e.g., Tom v. Voida*, 963 F.2d 952, 959 n.8 (7th Cir. 1992); *cf. Cf. Hiibel v. Sixth Judicial Dist. Court*, 124 S.Ct. 2451, 2460-61 (2004).

The majority *insists on using Anderer's "failure to provide an[ ] explanation for [JR's] injuries" as a factor supporting probable cause*. Opinion at *4, *10 (emphasis added). To the extent that the majority relies on Anderer's proper invocation of his contractual rights, as well as his inherent Fifth Amendment rights to refuse answer potentially incriminating questions when the suspect in a criminal investigation, to *"permit the [MPD] officer[s] to elevate [their] reasonable suspicion into probable cause*," *Tom v. Voida*, 963 F.2d at 959 (emphasis added), I disagree with this newly created theory of law which employs most novel reasoning. In their attempt to support their argument, the majority has seen fit to follow the ill-advised MPD and district court's errant finding, which includes his "refusal" to answer as a factor establishing probable cause, and has entered into an unchartered area of the law; essentially creating this new spurious theory of the law which runs contrary to Anderer's well-established rights. Why the MPD, district court and now the majority relied on this legal hand grenade, is most puzzling. Anderer properly invoked his contractual rights when he stated to Detective Harrison that *he would*

absolutely not answer any questions without union representation present. Given this fact, Anderer was acting well within his protected *rights (both constitutional and contractual) when he refused to give a statement to the IAD investigators*.[18] Thus, as a matter of logic, there was no reason for anyone to assume Anderer *should* have known how the bloody nose occurred, for there is no evidence in the record that Anderer has ever undergone medical training (*e.g.*, any type of training as a paramedic). Also, at the time JR's nose began bleeding, Anderer was seated in the driver's seat operating the police squad car while the juvenile was seated and secured alone in the back seat of the vehicle during his conveyance to the police station.

In the majority's brief and most limited response to my analysis on this issue, they initially state, in a footnote, that "the dissent contends that any reference to Anderer's failure to explain JR's bloody appearance in the probable cause analysis impinges on Anderer's Fifth Amendment and contractual rights, *Anderer himself makes no such argument* and, in fact, concedes his inability to explain JR's injuries." *Id.* (emphasis added). I disagree with this unsupported free-lance interpretation of Anderer's statements in the record. The majority seems to infer that because Anderer, in their opinion, did not make an argument regarding his contractual and Fifth Amendment rights, they are of no concern; I disagree. *See* Opinion at *10, note 8. It should be noted that, in his complaint Anderer alleges that he was deprived of "rights secured to him by the Constitution and laws of the United States and the State of Wisconsin." Anderer Complaint at *1. Anderer specifically refers to violations of

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[18] It should be noted that Officers Shoman and Cook also exercised their contractual rights not to make a statement without an attorney or union representative present when questioned about the alleged incident involving Anderer and JR.

his Fourth and Fourteenth Amendment rights as well as violations of § 1983 in his complaint on more than one occasion and it is most clear that any probable cause determination, by its very nature, implicates the Fifth Amendment once an individual, as in this case, is determined to be a suspect in a criminal investigation and questions are posed to him in the course of that investigation. In addition, in his complaint Anderer (as well as the other officers) pled his contractual rights when stating that he told IAD investigators that "he wanted union representation before making any statement," and that he knew the IAD was "there to investigate criminal allegations." *Id.* at *8, ¶ 40, 43. Undoubtedly Anderer, as a three and a half year veteran of the MPD, was well aware of his constitutional rights, for he was required to inform suspects of them each and every time he made an arrest in the course of his duties. Once Anderer was the suspect of a criminal investigation, his Fifth Amendment, as well as his contractual rights, came into play; therefore, the "operative facts" giving rise to a violation were pleaded as part and parcel of Anderer's Fourth Amendment claim. *See Kyle v. Morton High Sch.*, 144 F.3d 448, 455 (7th Cir. 1998); *see also Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

However, even if we are to assume that in this case the issue was not pled or argued (as seems to be the majority's point of view), *THE LAW IS VERY CLEAR TAHT A CONSTITUTIONAL ISSUE MAY BE RAISED SUA SPONTE AT ANY TIME WHEN IT COMES TO THE ATTENTION OF THE PRESIDING JUDGE OR JUSTICE THAT AN INJUSTICE MIGHT RESULT BY NOT ADDRESSING THE ISSUE*. *Singleton v. Wulff*, 428 U.S. 106, 112 (1976). This is particularly true in a situation where, as here, *A GRAVE INJUSTIVE DID RESULT, i.e., OFFICER ANDERER BEING UNCONSTITUTIONALLY ARRESTED AND, AS A DIRECT RESULT, LOSING HIS TENURED*

POSITION AS A POLICE OFFICER WHICH HE HAD HELD FOR 3.5 YEARS BASED ON THE FABRICATED TESTIMONY OF A PSYCHOTIC JUVENILE. As the Supreme Court pointed out in *Singleton v. Wulff*:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases . . . Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, or where injustice might otherwise result.

428 U.S. at 121 (internal quotations and citations omitted) (emphasis added); *see also, United States v. Heater*, 63 F.3d 311, 332 (4th Cir. 1995); *Cruz v. Melecio*, 204 F.3d 14, 22 n.7 (1st Cir. 2000); *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002); *Davis v. Blackburn*, 803 F.2d 1371 (5th Cir. 1986). *But cf. Pearce v. E.F. Hutton Group, Inc.*, 828 F.2d 826 (D.C. Cir. 1987). Anderer's well reasoned claim, which is supported in the record, that the City lacked probable cause to arrest him under the Fourth Amendment is itself a constitutional question. It follows that the Anderer's Fifth Amendment rights are implicated because they are so inextricably intertwined with the issue of whether or not the City had probable cause to arrest him based, in part, on his silence. This case should be resolved by this Court in a way that does not offend the Federal Constitution or its long-standing principle, embodied in the Fifth Amendment, that suspects in criminal prosecutions cannot have their silence, refusal or failure to explain used against them in a court of law. *See, e.g., Griffin v. California*, 380 U.S. 609 (1965). I believe that I would be derelict in my ethical duty if I failed to address this (Fifth Amendment) issue in view of the fact that Anderer has suffered a grave

injustice including the loss of his tenured employment as a Milwaukee Police Officer (3.5 years on the job) based on what amounts to nothing more than fabricated testimony.

Next, the majority attempts to (in a self-serving interpretation of his words) highlight the fact that Anderer, in their opinion, "concedes his inability to explain JR's injuries," and that "Anderer made several voluntary comments to other officers, including that he did not know how JR received the bloody nose." Opinion at *10, n.8. I disagree with this statement as presented by the majority. As noted above, although Anderer did make voluntary comments, some of those qualified as "off-the-record" and the rest were made before he ever became a suspect. However, they all amounted to a "refusal" to even attempt to explain what caused JR's nosebleed. I fail to see how these additional references to the record (and to "off-the-record" statements by Anderer) have any relation to, or in any way undermine, Anderer's well-established constitutional right under the Fifth Amendment to refuse to give a statement or his refusal to even attempt to explain the facts (which was, *i.e.*, a refusal to answer) and circumstances of an event in which he was suspected of committing a crime. An "inference of guilt for failure to [explain the] facts peculiarly [or supposedly] within [Anderer's] knowledge," *Griffin v. California*, 380 U.S. 609, 614 (1965), is constitutionally impermissible when based on Anderer's refusal to explain or speculate how JR's nose started to bleed (indeed one wonders how Anderer, who is not a medical professional, and who was seated in the front seat of the vehicle driving the squad car with JR seated in the rear, could be expected to diagnose the cause of JR's alleged "nosebleed," which was in fact "mostly [mucus] mixed with some blood," *see* Logan Aff. ¶¶ 25-26, and not what would be expected to result if JR was, as he alleged, punched in the nose by a 200 lb. male). Frankly, the majority misses the point.

What the majority has failed to consider, reply to or support in any way with relevant case law or precedent is the fact that Anderer's rights under the Fifth Amendment entitle him to absolute protection from self-incrimination beginning at the very moment he became a suspect in a criminal prosecution. Anderer's statements to Sgt. Jones, which were informal, off-the-record and made prior to an investigation being launched, as well as his clearly articulated "off-the-record" comments to IAD. *See* Opinion at *4. In addition, Anderer's "on-the-record" refusals to answer any questions posed to him and right to remain silent continued to be protected throughout the course of the IAD's query into JR's preposterous allegations. *See United States v. Hale*, 422 U.S. 171, 180 (1975); *see also Driebel*, 298 F.3d at 637 ("IT IS INDEED "WELL-SETTLED . . . [THAT] '[P]OLICEMEN . . . ARE NOT RELEGATED TO A WATERED-DOWN VERSION OF CONSTITUTIONAL RIGHTS.'").[19] Indeed, the IAD officers attempted to side-step and take an end-run around their own regulations by threatening Anderer in an attempt to coerce him (threats) into giving a statement, however, cognizant of his rights Anderer once again refused to fall into the trap and give a statement. I am convinced that it was constitutionally impermissible for the MPD (as well as the district court and now the majority) to base their probable cause determination on "Anderer's total failure to provide any explanation for [JR's] injuries." *See* Opinion at *10; *Griffin*, 380 U.S. at 614. Such an approach has never

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[19] It is important to note that the comment Anderer made to Sgt. Jones immediately after JR was taken out of the car was made off-the-record and well before he was ever considered a suspect. In addition, statements made to IAD investigators regarding the charges were explicitly "off-the-record" when Anderer made them. In no way can these statements be considered as rising to the level of a waiver of Anderer's Fifth Amendment or contractual rights. *See* Opinion at *2, *4.

been endorsed by either the United States Supreme Court or this Court. *See, e.g., Tom v. Voida*, 963 F.2d at 959 n.8.

It matters not in the slightest that Anderer related his refusal or inability to explain JR's alleged injuries to his fellow officers (either before becoming a suspect or after going "off the record"). It matters even less that Anderer constantly maintained this position long after the District Attorney and his immediate subordinate decided that there was no merit to the charges against him. Also, the fact that Anderer included a statement conceding his refusal to explain the cause of JR's alleged injuries in his pleadings before the district court (a fact that the majority now believes somehow affects his Fifth Amendment rights, see Opinion at *10 note 9) *is likewise irrelevant.* What is important, and what the majority chooses to overlook or even address in their opinion, is that at the time the MPD made the determination to arrest Anderer, its investigators were acting in violation of his Fifth Amendment protection against compelled incrimination. By using his "failure to explain JR's injuries," or his absolute refusal to make any formal statements as to the reason or alleged cause of JR's bleeding nose, against him the MPD was impermissibly acting in derogation of Anderer's constitutional rights. *See Griffin*, 380 U.S. at 614.

Furthermore, the majority's approach to this issue ignores the forest in search of a solitary tree by disregarding the exculpatory import of Anderer's statement. As the majority points out, Anderer maintained in off-the-record statements before his arrest, and maintains to this day, that to this day he does not know how JR's alleged fabricated injury occurred. Opinion at *10 n.8. For, as this dissent illustrates: How was Anderer to know the source of JR's fabricated injury (which was likely no more than the result of a good sneeze)?

If anything, the majority's additional citations to the record only serve to underscore the fact that Anderer

throughout this period consistently denied any knowledge of the cause of JR's alleged injury and on numerous occasions voiced his ignorance of how and why JR suffered his "bloody nose." The majority cannot have it both ways, *i.e.*, Anderer's refusal to speak cannot be used against him while Anderer's "off the record" statements about his lack of knowledge as to how JR's nose started bleeding are also used to elevate reasonable suspicion to probable cause. Anderer's repeated refusal to answer and avowed ignorance of what caused the boy to start bleeding does nothing to increase the "probability or substantial chance" that Anderer was guilty of some wrongdoing such that there could possibly have risen to the crescendo of establishing probable cause to arrest him. *See Beauchamp*, 320 F.3d at 743. Indeed, Anderer's conceded and consistent refusal and truthful inability to explain what had occurred should have, if anything (and if the IAD had even had knowledge of these statements, as the majority seems to suggest) been viewed by a reasonable officer as evidence that Anderer was indeed telling the truth and not guilty of any wrongdoing. There is no proof in this record of any inconsistency in the "off-the-record" statements Anderer made to IAD investigators or pre-investigation statements he made to his coworkers. In the end, the majority suggests no justification whatsoever for the use of Anderer's constitutionally (and contractually) protected right to refuse to answer questions against him in the course of a criminal investigation. *See Stewart v. United States*, 366 U.S. 1, 7S8 (1961).

E. Evidence Exculpating Anderer

The great weight of the evidence, including the sworn statements of six police officers (Officers Logan, Jones, Cook, Shoman, Bohlen, and Centeno) and one lay witness (Mitchell), establishes the fact that Anderer did not strike JR at any time, including the time frame when JR was

being secured in Anderer's squad car. However, the district court, in its order granting summary judgment for the defendants, journeyed into the wide and boundless abyss of speculation and conjecture and took it upon itself to state that ANDERER HAD AN OPPORTUNITY TO HIT JR SOMETIME AFTER JR WAS IN THE SQUAD CAR by citing "THE TIME IN WHICH JR WAS ALONE WITH ANDERER IN ANDERER'S SQUAD CAR," AS ONE OF THE CIRCUMSTANCES WHICH "WOULD HAVE GIVEN A PRUDENT OFFICER PROBABLY CAUSE TO ARREST ANDERER." *Anderer v. Jones*, No. 01-C-0668, at *8 (E.D. Wis., Sept. 30, 2002).

However, *the record clearly establishes* that Anderer radioed the station (according to police protocol) as he was leaving the Marina, and *arrived at the station "exactly two minutes and two seconds later*." Anderer Aff. ¶ 43 (emphasis added). Morever, Anderer testified via affidavit that "[a]t no time did I stop my squad car for anything other than traffic lights from the time I left the Pump House Marina until I arrived inside the District No. 2 garage, nor did I speak to JR during the transport, nor did I hit JR anytime, ever." Anderer Aff. at ¶ 44. Nonetheless, JR was once again deliberately lying and/or fantasizing when he told Detective Smith, after Anderer's arrest, that Anderer *had* stopped the squad car on the way to the police station and exited the vehicle in order to yell at him (JR). This scenario certainly enters into the realm of impossibility, considering Anderer could have just as easily yelled at the juvenile from the front seat (there was no need to stop the automobile) and *the uncontroverted fact that Anderer did indeed arrive at the police station, with JR secured in the back seat of his squad car, 122 seconds after leaving the Marina*. I am at a loss to understand how anyone could have believed that the juvenile (JR) was truthful when telling Detective Smith that Anderer "stopped the car," got out of the driver's seat, "opened the [back]

door," and then proceeded to "t[ell] [JR] that he was going to 'whip his ass.'" With the time that it would have taken for Anderer to stop the squad car, turn off the ignition switch (per MPD procedure), remove the key from the ignition, unfasten his seat belt, open the driver's side door, exit the vehicle, close the front door, open the rear door, proceed to yell at the juvenile, close the rear door, open the front door, re-enter the vehicle, re-fasten his seatbelt, insert the key, start the engine, and continue to District No. 2, *there is no possible way all of this could have been accomplished within the 122 second recorded time frame*.

Furthermore, in contrast to the trial judge's unexplained, speculative thought process, JR *repeatedly specifically stated that Anderer hit him in the face as he was entering the vehicle at the Marina and while being secured therein before the commencement of his conveyance to the station, not at any other time*.[20] Nonetheless the district court, in its journey into the wide and boundless abyss of speculation, inappropriately chose to rely on "the [amount] of time Anderer spent alone with JR" *on the way to the police headquarters* (only 122 seconds) as evidence corroborating JR's claim of abuse. *Anderer v. Jones*, No. 01-C-0668, at *11 (E.D. Wis. Sept. 30, 2002). Prior to Anderer's arrest, JR *never claimed to have been screamed at or slapped during the conveyance to the police station (while alone with Anderer)*, JR *only* stated that he was hit in the face and mouth *as he was being placed in the squad car, and not at any time thereafter*.

Also, as Anderer points out in his complaint, the MPD broke with ITS OWN PROTOCOL WHEN, DESPITE LT. HOERIG'S REPORT THAT JR WAS "SERIOUS[LY]" IN-

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[20] By all relevant witness accounts (*e.g.*, citizen Mitchell and Officers Shoman, Bohlen and Centeno), Anderer placed JR in the squad car without incident.

JURED, *see* Hoerig Aff. Exh. 4. THE MPD FAILED TO TRANSPORT JR TO THE HOSPITAL TO HAVE HIM MEDICALLY CLEARED, AS REQUIRED TO DO UNDER BOTH STATE LAW AND MPD RULES AND REGULATIONS. *See* Wis. Stat. § 938.20(g)(4); *see also* MPD Manual § 3.090.95(H)(5)(b).[21] Nonetheless, had anyone medically trained been called to perform even a cursory examination of JR (considering Hoerig's description of JR as being "seriously" injured), such as a paramedic, jail nurse or physician, the MPD/IAD investigators not only would have discovered that JR's lip cuts were *inconsistent* with a punch (no bruising, swelling, contusions or abrasions) to his face, they also would have learned from a proper investigation, interrogation and cursory physical examination, that two weeks before this incident *THE JUVENILE HAD ENGAGED IN INFLICTING SELF-MUTILATION UPON HIMSELF* (he had cut crosses into both of his arms). These crosses obviously were still visible on JR's person.

Had the MPD conducted an adequate physical investigation, and had JR been asked to explain how he obtained

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[21] LT. HOERIG APPARENTLY INTENTIONALLY EXAGGERATED AND MAGNIFIED THE INCIDENT REPORT SHE COMPLETED BY STATING THAT JR WAS "SERIOUSLY" INJURED WITH "SEVERE CUT[S]/LAC[ERATIONS]." Hoerig Aff. Exh. 1001. However, even if one were to assume this is true, the report also states that JR "refused" treatment. *Id.* If JR was "serious[ly]" injured, the Lieutenant in charge of the investigation (Hoerig) violated MPD policy and procedure, and possibly state law, by failing to transport JR (an allegedly seriously injured person) to a hospital for treatment and obtain a medical release stating medial attention was refused. *See* § 938.20(g)(4); *see also* MPD Manual § 3.090.95(H)(5)(b) and (c). On the other hand, if JR was not "seriously" injured, as the uncontroverted evidence (sworn statements and photographs) set forth and accurately displayed in this dissent establishes, Det. Lt. Hoerig filed a falsified police report. Under either scenario this casts Lt. Hoerig's judgment as to probable cause in serious doubt.

these obvious scratches, marks and abrasions on his arms just below the shoulder, assuming he answered honestly, the investigators would have learned that they had been self-inflicted. As Dr. O'Grady stated in an assessment of the patient, dated April 10, 2001 *(it is interesting to note that Dr. O'Grady's assessment was performed almost contemporaneously to the to the incident in which JR falsely accused Anderer of assault, April 17, 2001),* JR *had recently experienced "PARANOIA AND AUDITORY HALLUCINATIONS [IN WHICH] VOICES WERE TELLING HIM TO HARM HIMSELF, OR TO HARM OTHERS."*[22] *See* O'Grady Report, Anderer Aff., Ex. 29 at 1 (emphasis added). JR's treating psychiatrist further opined that *JR suffered from depression, ADHD, and psychosis, and that HE WOULD CONTINUE TO POSE A "MODERATE" RISK FOR CONTINUED PSYCHIATRIC ILLNESS PROBLEMS "UNTIL HE C[OULD] BE STABILIZED FOR SOME LENGTH OF TIME ON [HIS] MEDICATIONS."* *Id.* at 3 (emphasis added).

Thus, given *JR's troubled psychiatric condition and behavioral disposition at this particular time (history of self-mutilation, "voices" he heard which "t[old] him TO HARM HIMSELF OR OTHERS," and repeated examples of run-ins with police),* JR was *fully capable* of contriving a story in relation to his alleged abuse and resulting alleged nosebleed in order to cause the previously threatened trouble for his arresting officer so as to carry out his contrived psychotic intent to harm others and get Anderer and Cook

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[22] As of June 13, 2001, according to JR's mother, JR was still undergoing treatment for "hearing voices," Hoerig Aff., Ex. 1001 at 48, a fact that is confirmed by reports from JR's physician at the time, Dr. Block. See Anderer Aff. Ex. B at 69 ("Hearing voices telling him to kill himself."). JR was prescribed Seroquel to help control his psychological condition and inhibit the "voices" he was hearing. *Id.* at 49.

fired.[23] Indeed, JR's nosebleed was most likely the result of a normal/hearty sneeze, rupturing a thin membrane or a blood vessel in his nasal passage, thus causing a nosebleed (which may have occurred on more than one occasion in the immediate days leading up to this incident) and thus produced nasal discharge consisting of "mostly [mucus] mixed with some blood," Logan Aff. ¶25.

In any case, what this brief glance into JR's medical condition makes clear is that *even a minimal medical investigation (consulting a medical health worker to perform a cursory physical examination) would have alerted investigators to a plethora of possible alternative medical and logical explanations for the bleeding exhibited by JR at the Precinct 2 Police Station, the extent to which he had been medicated, and would have also revealed serious psychiatric problems manifesting in self-mutilation, which most certainly would and should have contributed to raising serious doubts as to JR's credibility*. Instead, Chief Jones and his MPD command officers placed Anderer on the "express track" to arrest, and it appears that the four or five investigators involved found neither the time, THE ENERGY NOR THE INCLINATION TO COMPLY WITH THEIR OWN RULES AND REGULATIONS (WHICH REQUIRE THAT A PERSON COMPLAINING OF AN INJURY WHILE IN CUSTODY SUCH AS JR (LT. HOERIG STATED JR HAD SUSTAINED

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[23] In addition, had the investigating officers even attempted to make an in depth inquiry into JR's medical record or obtain an explanation for his out-of-control behavior that night they would have discovered that two of JR's prescribed medications—Depakote and Paxil—are listed as having caused abnormal bleeding in users (the combination of which may have intensified the effect). *See* Depakote Side Effects, *available at* http:www.canadatrustrx.com/Depakote-information-Depakote-discount.htm; *see also*, Dunplay, et. al. PHYSICIAN'S DESK REFERENCE 1585-87 (58th ed. 2004). This also could help to explain the dried blood on JR's shirt, which most likely was the result of previous nosebleeds.

"SERIOUS INJURY") BE PHYSICALLY EXAMINED, *see supra* note 21, and accompanying text) PRIOR TO HAVING ANDERER ARRESTED.

As for the *lack of even one living, breathing person's testimony* corroborating JR's claim of abuse, reaching out the majority states that "Sgt. Jones and Officer Shoman could not corroborate JR's allegation against Anderer," but attempts to discount the import of such a fact by noting that "neither could [Jones or Shoman] refute it." *See* Opinion at *12. As to Shoman, this is an incorrect summary of the record, for as a reading of her affidavit reveals, Shoman *stated that she was positioned in her squad car slightly in front and to the right of Anderer's squad car and witnessed Anderer walk JR over to the squad car*. Although Shoman did not see Anderer place JR into the car she went on to state that: "[she] would have noticed a fight [between JR and Anderer] if one had occurred," but rather "*did not notice any commotion between Officer Anderer and [JR]*." *Id.* ¶¶ 21, 22 (emphasis added). However, Shoman went on to tell investigators that she had seen JR "in the back of Anderer's squad [car]" and that she had observed "no physical confrontation [or] injuries or blood on JR" at any time. Harrison Aff. ¶ 15. Both of these sworn statements by Officer Shoman also belie JR's claim that Anderer punched him immediately after securing him in the back seat of the squad car. *Thus, we must ask ourselves: why should anyone (Lt. Hoerig, Chief Jones, the district court judge, or the majority) give any credence to, much less believe, the incorrigible psychotic juvenile JR (without even a minimal investigation into his credibility) over this reliable witness Officer Shoman? Was Officer Shoman lying?*

The majority not only goes about mischaracterizing Shoman's exculpatory testimony (incorrectly stating that Shoman's testimony did not "refute" JR's allegation of abuse), *see* Opinion at *12, it also casts aside without explanation, in an unusual manner, the *additional exculpatory*

testimony from *four other police officer witnesses (Bohlen, Centeno, Logan, and Cook) and the citizen witness (Mitchell)* that, for whatever reason was not sought by MPD investigators in the time period prior to Anderer's arrest (Negligence? Bad faith? Orchestrated disregard of fair play and justice?—call it what you will).

As outlined above, James Mitchell, a citizen who was on the scene at the time of JR's arrest, according to his sworn affidavit, states that he "watched *every step of the way* while Officer Anderer [took] [JR] to his squad car," and that he continued to observe JR "as Officer Anderer guide[d] [him] into the back seat of the squad, [affixed JR's] seatbelt . . ., [and] close[d] the door [to the car]." Mitchell Aff. ¶ 14 (emphasis added). Mitchell, *whose observations were contemporaneous with the specific time period that JR claims he was hit or punched*, is *emphatic* that he (Mitchell) "*[a]t no time [saw] Officer Anderer strike [JR], or act in an[ ] abusive manner toward him*," *id.* ¶ 15 (emphasis added), and that Anderer "*at all times . . . acted in a very professional manner*" toward the juvenile. *Id.* ¶ 16 (emphasis added). *Again, I must ask: is it rational to conclude that the witness Mitchell is lying about what happened and that the unruly, belligerent and out-of-control psychotic (less than law-abiding) juvenile is the only person telling the truth? Does the majority really believe Mitchell was lying?*

This is absurd; and given that the investigating officers were fully aware of the information Mitchell could provide, and were in possession of his address and phone number, and considering the incredibility of the fabricating juvenile, JR, (the claimant himself, and the *only* person who alleged abuse had taken place—rape and assault—with proof of neither), it was furthermore unreasonable for the MPD command officers and the IAD investigating officers to cut short their investigation before even attempting to obtain Mitchell's, or the other officers', accounts of the alleged situation when they well knew the most questionable and

troublesome character and behavioral traits of the juvenile they were dealing with.

Corroborating Mitchell's testimony, Officer Bohlen states in his affidavit that he "watched Anderer walk JR to his squad" and "*did not notice anything out of the ordinary when Officer Anderer placed JR in his squad,*" Bohlen Aff. ¶¶ 10, 12 (emphasis added). Bohlen also claims that he had "a *direct vantage point* to make these observations as *there w[ere] no obstructions in [his line of] view of Officer Anderer escorting and placing JR in his squad, and at no time was [he] more than 25 to 30 feet away from Officer Anderer and JR.*" *Id.* at ¶ 13 (emphasis added).

Officer Centeno (another exculpatory witness and officer at the scene of the alleged crime) also "saw Officer Anderer place the boisterous juvenile [JR] in[to] his squad," and remarked that "*[n]othing unusual happened*" between the officer and the suspect (JR). *Id.* ¶¶ 13, 14 (emphasis added). In fact, Centeno goes so far as to remark that "it *was not possible for Officer Anderer to have struck [JR]* as [he (Centeno)] was but one car length away from [Anderer's] squad and would have noticed [if] Officer Anderer [had assaulted JR]." *Id.* ¶ 23 (emphasis added). *Was Officer Centeno lying*?

In spite of the fact that Centeno's partner, Officer Bohlen, "spoke to a supervisor at [the Second Precinct Police Station] and told the supervisor that [he and Centeno] were at the [Marina] and . . . should be identified as individuals to be interviewed in any further investigation," neither officer was ever interviewed by investigators prior to Anderer's arrest. *Why? Orchestrated investigation possibly?*

Officer Logan, who was also on the scene of the arrest, corroborated the testimony of the other officers and noted that he "[did not] observe[ ] Anderer strike [JR]," Logan Aff. ¶ 47. Furthermore, Logan stated that as he had passed Anderer's squad car on the way out of the Marina, he had

"observed [JR] s[illegible]d in the backseat of the squad and [JR] did not appear to be injured in any way." *Id.* ¶ 17 (emphasis added).

Finally, Officer Cook, who unlike the others, was asked to give a statement prior to the arrest, but stated, at the time, *that he "did not wish to make a[ ] statement[ ] WITHOUT [A] UNION REPRESENTATI[VE]" present—was eventually granted immunity from criminal prosecution and compelled to answer questions at 12:45 a.m., fifteen minutes AFTER Anderer's arrest and was therefore not used as part of the probable cause determination by Hoerig.*[24] Cook Aff. ¶¶ 41,

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[24] The majority suggests that if "the statement given by officer Cook, had . . . been given prior to Anderer's arrest, [it] seems likely to have further supported the investigating officer's determination that probable cause existed to arrest Anderer. Opinion at *12 n.10. To support this the majority exaggerates Cook's statements to the extent that they cite him as having stated that after arriving at the station he "immediately noticed [JR] with blood running down both nostrils, his chin, blood on his shirt and both pant legs," and that he "was taken aback because the kid was in perfectly good shape before he went in to the squad, but not when he came out and thats [sic] not good." *Id.* However, this mischaracterizes Cook's testimony under oath. In Cook's affidavit he does state that he saw "blood dripping out of [JR's] nostrils straight down his chin," Cook Aff. ¶ 26, but nowhere does he state that he saw blood on the boy's shirt and pants. Also, Cook actually states that he was "shocked because when Officer Anderer took JR to his squad, JR was not bleeding," *Id.* at ¶ 27, however, the majority conveniently refuses to accept the fact Cook goes on to affirm that "[h]ad Anderer encountered any difficulty placing J.R. into his squad, I would have been in a position to have noticed any such commotion." *Id.* at ¶ 20. This by no stretch of the imagination can be classified as evidence which would "have further supported the . . . probable cause determination." Opinion at *12 n.10. Indeed, this is actually exculpatory evidence which (had the investigators bothered to gather it) would have severly damaged

(continued...)

45 (emphasis added). At that point, Cook stated he had "s[een] Officer Anderer speaking to JR" after JR had been placed "in the back of Anderer's squad." Cook Aff. ¶¶ 18-20. *Contrary to JR's continuance of his false and malicious allegations that Anderer had "yell[ed] at [him]" at this time*, Smith Rep. at 7, Cook stated that he "*never heard Officer Anderer scream at JR*," and furthermore that *Anderer had not "encountered any difficulty in placing JR into his squad*." Cook Aff. ¶¶ 18-20 (emphasis added). Cook emphasized that, *had* Anderer encountered "any difficulty" placing JR in the squad, Cook "would have been in a position to have noticed any such commotion." *Id.* ¶ 20.

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[24] (...continued)
their unfathomed probable cause determination, despite the majority's intimation.

Furthermore, in the affidavit testimony given by Cook, he emphasized that the investigation conducted by the IAD was "unfair" and asserted that the "[IAD] had the power to get anyone they wanted for any purpose, and [that] this [situation] was reminiscent of Berlin in 1939." Cook Aff. at ¶ 71. Cook also chastized the IAD officers by producing his rules notebook and went on to state that "[t]hese rules you hold so precious, go out the window when you want to 'get' someone" as he threw the notebook over his shoulder. *Id.* at ¶ 72. It should be reiterated that Cook believed he was going to be a target of JR's outrageous and ridiculous accusations as well. *See supra* pp. 1-8, 11, 27, 32-37, 48, 69. Therefore, even after the incident, Cook feared that he would be subjected to the same unfair procedure that had befell Anderer, indeed Cook told A.D.A. Jon Reddin that he "was afraid the [IAD] of the MPD would trade up if they could not get Anderer by getting [him] for raping J.R. instead." Cook Aff. at ¶ 61. Therefore, despite the twist that the majority puts on out-of-context selective pieces of Cook's testimony, he would not have been beneficial to the IAD in their search for probable cause. In reality, Cook was not compelled to testify until after Anderer's arrest because he would have damaged the IAD's fabricated and terribly weak probable cause case against Anderer.

Obviously Chief Jones chose not to believe even one of his four officers (nor the citizen witness Mitchell) who all affirmatively stated that Anderer did *not* abuse the juvenile. Nonetheless, Chief Jones, after being consistently rebuffed in his attempts to prosecute Anderer, he ultimately used internal procedures to terminate Anderer from the Department, after his 3 1/2-year tenure, for internal abuse charges in spite of the mountain of exculpatory evidence in the record and the Deputy District Attorney Jon Reddin and D.A. E. Michael McCann's finding that no charges could be substantiated. *Was Officer Cook (along with Officers Bohlen, Logan, Centeno, Shoman and witness Mitchell) also lying*? Moreover, if not by design, *why did the MPD command officers and the IAD investigating officers wait to compel Cook's statement until fifteen minutes after Anderer's arrest? Why wasn't this done hours, half an hour or even fifteen minutes earlier? Didn't they want his damaging exculpating testimony in the record on the probable cause issue?*

It is interesting to note that the IAD investigators also determined (probably with malice or forethought) not to interview these five exculpatory witnesses (Bohlen, Logan, Centeno, Cook, Mitchell), and because of this it was unreasonable for them to proceed with the arrest of Anderer. As Deputy District Attorney Jon Reddin stated in his memorandum, once these people *were* interviewed (Shoman, Cook, Mitchell, as well as Officers Logan and Anderer were ultimately interviewed by Reddin himself), the only logical conclusion was that *no criminal charges could be sustained. See* Reddin Memo., Jones Aff. Ex. 1002 at 1 ("*I have interviewed [JR], Anderer, officers Janice Shoman, Jeff Cook and Jeff Logan, and civilian James Mitchell [and] [b]ased on those interviews I have concluded that we cannot prove how and by whom [JR's] injuries were incurred, and consequently [I conclude that] no criminal charges can be sustained.*") (emphasis added).

F. Lack of Good-faith in Investigation and Termination of Officer Anderer

I must reiterate that my purpose in reciting, in minute detail, the vast amounts of exculpatory testimony and evidence (which the investigators purposely failed to gather before arresting Anderer) in the respective time frames is *not* to play Monday morning quarterback nor to nitpick the record for minor (although these are far from minor) deficiencies in their investigation. Instead, it is my intention to convince my fellow colleagues that Anderer, who did not receive the protection he is entitled to as a U.S. citizen under the Fourth and Fifth Amendment as well as under his employment contract with the MPD, be given his day in court. I also wish to point out that the conduct of the officers who took part in this investigation leaves much to be desired and can best be described as surprising.

I am well aware that the law does not ordinarily "require that a police officer conduct an incredibly detailed investigation at the probable cause stage." *Spiegel*, 196 F.3d at 724-25. Nor does it "require law enforcement officers to . . . conclusively resolve[ ] each and every inconsistency or contradiction in a victim's account" prior to arrest, *id.* at 725, for, as this Court has made clear on prior occasions, "once [the officers] perform[ ] a *good-faith investigation* and assemble[ ] sufficient information from the totality of the circumstances to establish probable cause, they are not required . . . to continue searching for additional evidence." *Driebel*, 298 F.3d at 643-44 (emphasis added).

Under these circumstances, I am confident that the activity on the part of the command officers of the MPD and the IAD is not worthy of being classified as a proper investigation—much less a *good-faith*[25] *investigation*—but should

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[25] Black's Law Dictionary defines good-faith, in pertinent part as: "A state of mind consisting of (1) honesty in belief or purpose, [or]

(continued...)

be more precisely characterized as an orchestrated inquiry in which the investigators merely went through the motions. The investigation amounted to, at best, no more than a sham inquiry (failure to follow police protocol) and produced what may have been (in the worst-case scenario) a pre-ordained result. The unreasonableness of this so-called "investigation" raises a *dark cloud of suspicion* over each and every one of the superior officers of the MPD and members of the IAD who participated in this detail. These officers failed to follow appropriate police procedures and selectively failed to interrogate in a timely fashion *at least four* police witnesses and the lay witness Mitchell who were unfavorable to the command officer's decision to arrest Anderer. Furthermore, the only "evidence" the investigators gathered in their "investigation" was a smattering of selected information which, when considered in its entirety, failed to establish probable cause.[26] The evidence was thus

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[25] (...continued)
(2) faithfulness to one's duty or obligation . . ." BLACK'S LAW DICTIONARY 701 (7th ed. 1999). In addition, in *Driebel*, we characterized a good-faith investigation in the context of probable cause as one where investigators "assemble[ ] sufficient information from the totality of the circumstances to establish probable cause." *Driebel*, 298 F.3d at 644. Under either formulation, the officers investigating JR's allegations against Anderer fell far short of "good-faith."

[26] As discussed above, the universe of information relied upon by investigators was: (1) a baseless claim of abuse launched by an obviously lying juvenile witness suffering from auditory hallucinations urging him to do harm to himself and others (Cook, Logan and Anderer) and who was thus *not* "reasonably credible" (even the district court found and admitted JR's "statement alone [wa]s an insufficient basis for probable cause"), and (2) a bloody nose and cut inner lip which, under the circumstances (namely, JR's (continued...)

"objectively [in]sufficient to warrant a prudent person in believing that [Anderer had] committ[ed] [the abuse]." *Mounts*, 248 F.3d at 714. *This is most tragic considering the oath that the investigating officers took to uphold the law and faithfully discharge the duties of the office to which they were appointed, for they failed to carry out their sworn duty in a fair, unbiased and impartial manner*.

Considering the lack of reliable evidence of Anderer's guilt, I, unlike the majority, *am convinced it was unreasonable for the investigatory detail to cast aside (and refuse to incorporate) the overwhelming amount of available known exculpatory testimony from officers (Centeno, Logan, Bohlen, and Cook) and a civilian witness (Mitchell) at the scene.* It was entirely unreasonable for the investigators to rely on selected tainted "evidence" of the alleged abuse that *fell far short of being* "reasonably trustworthy" or, for that matter, "sufficient to warrant a prudent man in believing that [Anderer] had committed [a battery]." *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Mounts*, 248 F.3d at 715.

Of course, the MPD command's unrelenting insistence in clumsily attempting to validate JR's allegation against Anderer—despite the lack of evidence (direct and/or circumstantial) of his guilt—did not stop with his arrest. Chief Jones, in particular, would not be deterred, for he personally insisted on pursuing the charges against Anderer. Initially, Jones had Anderer arrested *without* first referring the matter to the District Attorney's office for an independent review and determination, which is the more proper and

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[26] (...continued)
"pharmacopoeia" of medications and mental problems—self-abuse and "hallucinations telling him to harm himself or others") could have had a host of explanations *other* than physical abuse from Anderer.

desired procedure.[27] Also, after *four investigations* (two independent) turned up *insufficient evidence to pursue criminal (either felony or misdemeanor) child abuse charges against Anderer*, the IAD insisted on pursuing Anderer by converting the unsuccessful and clumsy criminal investigation into a last-ditch *internal* investigation to determine whether Anderer had possibly violated ANY MPD rule or regulation, probably due to Chief Jones's insatiable desire to have Anderer terminated.[28] Ultimately, after the possibility of criminal charges against Anderer had been eclipsed, and just 96 hours after Anderer filed a lawsuit against the department, the newly appointed IAD command officers had the temerity and audacity to bring a police rule violation charge against Anderer producing the dubious charge of abuse of a child, of which there is no proof. This rule violation charge is what, in the end, resulted in Anderer's termination from the police force (again, without any felony, misdemeanor, or even city ordinance violation ever being brought, much less substantiated).

The nature of the internal charge was also most questionable when considering the timing of the charge in relation to the other facts and circumstances. The termination charges were brought only after Anderer's case had laid dormant for approximately a month and were filed just 96 hours—or three days—after Anderer filed his lawsuit against Chief Jones, Charles Grisham, Lt. Hoerig, Detective Cowan, and the City of Milwaukee. The decision to bring these

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[27] *See supra* note 7 and accompanying text.

[28] Furthermore, it is interesting that they brought the internal charges against Anderer without conducting any further investigation into JR's allegation of abuse. Thus, they charged Anderer internally, and had him discharged, on the same (now complete) record and for the same offense that had generated *multiple* refusals to prosecute the criminal case against him by the DA's Office (two independent determinations by the Deputy District Attorney and the District Attorney himself).

charges is inconsistent with the District Attorney's Office's clear and repeated affirmation of the decision that there was *insufficient* evidence to prosecute Anderer for abuse. *See* Jones Aff., Ex. 1002 at 1-2 ("I cannot say with any assurance what happened .... It is entirely conceivable ... that [JR] inflicted the injuries to himself").[29]

III. Conclusion

This case, being very fact-intensive, begins and ends with the utter lack of credibility of JR's complaint against Anderer alleging that the officer struck him in the face and/or nose with his fist as he (Anderer) was positioning and securing JR in the back seat of the squad car—*before* the two-minute-two-second drive to the police station began. And on that score, as the district judge properly in part concluded,"Anderer raises *serious issues* concerning JR's

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[29] The majority's contention that the "the Deputy District Attorney's later decision not to pursue criminal charges" is an "irrelevant fact" is a red herring, Opinion at *11, n.9, because although the decision by Jon Reddin was made after Anderer had been arrested (contrary to the preferred course of action, *see supra* note 7), such a determination simply lends further credence to Anderer's argument that the probable cause determination by the IAD, district court and majority was unreasonable. Arthur Jones Aff., Exh. 1002 (Reddin concludes that what happened to JR "in the back of the car will probably never be known to anyone but JR and Anderer," and that the speculative nature of the accusations against Anderer were "not the stuff of criminal charges."). It also serves to further establish that another independent law enforcement official was of the opinion that JR was utterly and totally unreliable as a witness, because as Jon Reddin noted in his written decision not to prosecute: "It is entirely conceivable [that] given [JR's] agitation, mental problems and stated intentions to get money out of this incident, that he inflicted the injuries to himself." *Id.* Also, Reddin's decision helps establish that the IAD failed to conduct a reasonable good-faith investigation, for had one been performed, Anderer would not have been arrested because probable cause never existed.

credibility . . . ." *Anderer v. Jones*, No. 01-C-0668, at *7 (E.D. Wis. Sept. 30, 2002). To recap the pertinent parts of the record, the MPD and IAD command and investigating officers, including the Chief, were aware of (or, had they conducted a reasonable and unbiased investigation, *would* have at least been aware of) the following factors which should have served to put JR's credibility in serious doubt, if not destroy it completely:

(1) ***JR had a demonstrated behavioral problem*** (he exhibited *outrageous, out-of-control, profane and obscene language* at the scene of the arrest, and further Officer Shoman stated he was a "*constant problem*" in her patrol area);

(2) ***JR had threatened to sue his arresting officers for money and get them (Anderer, Cook, and Logan) fired***;

(3) ***JR had exhibited a propensity to lie*** (he had accused Officer Cook of *raping him*—which the trial court found to be an "*obvious lie*," *Anderer v. Jones*, No. 01-C-0668, at *7 (E.D. Wis. Sept. 30, 2002));

(4) ***JR was supposed to be heavily medicated (but had failed to ingest his prescriptions on the day of the arrest)*** (and *at least two* of JR's prescribed drugs, as the officers well knew, were *used to control his psychiatric and behavioral problems*);

(5) ***the medications JR had failed to ingest that day were vital to his mental and physical well-being*** (JR's mother had urged the officers to "releas[e] [her son] from custody as soon as possible" in order that he might ingest his drugs, Cook Aff. ¶ 34);

(6) *not one individual, including those interviewed by police, ever corroborated JR's allegation, and at least five individuals—four police officers (Shoman, Cook, Bohlen, and Centeno) and one citizen witness (Mitchell)—affirmatively refuted JR's hallucinatory tale* (although only Shoman was interviewed by police prior to the arrest);

(7) *there is no record of any blood or other stain on Anderer's uniform, and, viewed under a high-powered flashlight, Anderer had no blood, abrasions, bruising, scratches, or swelling of tissue on his hands, much less any evidence of trauma*, *see* Smith Report at 9; Anderer Aff. ¶ 98;

(8) *JR's minor inner lip cuts were not consistent with the juvenile's allegation that he was hit in the face by a 200-lb. adult male* (the I.D. Technicians testified—and we must accept as true at this stage—that the "small [lip] cut appeared as though [JR] may have bitten his lip or had a canker sore," and thus "*was not consistent with [the juvenile's allegation that he was] struck in the face by [Anderer]*," Kathrein Aff. ¶ 16);

(9) although JR, in an offhanded and flippant manner claimed he was struck in the face by Anderer, and suffered a nosebleed as a result, *there was not a scintilla of evidence of bruising, abrasions, swelling, or any other sign of trauma to JR's face, nose, mouth or lips which would correspond with being hit in the face with a hand or fist. Also, the cuts on the inside of JR's lips, as well as the nosebleed, in the absence of any mark, laceration, bruise or abrasion on the*

outside of JR's face are NOT consistent with a blow to the face from a 200 lb. adult male police officer. It is more accurate to believe that the minor inner-lip injuries resulted from a self-inflicted bitten lip which perhaps resulted from JR's injestion of a myriad of medications which, in combination, caused his dried-out mouth condition (canker sores) and that the nosebleed was caused by a normal/hearty sneeze which ruptured the thin nasal membrane or a small blood vessel (contributed to by abnormal bleeding caused by the medication he was ingesting) in the nasal passage; and

(10) *JR had been diagnosed by a psychiatrist as suffering from auditory and visual hallucinations as well as with the propensity to "harm himself and others" and he had the opportunity to inflict harm upon himself (self mutilation on both arms) and others (i.e., falsely accusing Cook of rape and claiming he would sue both Cook and Anderer and have them fired; chewing or biting his lip)*

The majority somehow looks past all of the recorded exculpatory evidence which seems to make clear JR's obvious propensity to fantasize and lie while (in stark contrast to the trial judge's contrary finding that JR was *not* a reasonably credible witness) embracing JR's claim, that the 200-lb. Officer Anderer hit him in the face with his fist as he was being placed in the squad car, as being reasonably credible. *See* Opinion at *9-11 (finding in favor of JR's credibility). The majority concludes that because: (a) JR arrived at the police station with a bloody nose; (b) while sitting at a table with the other burglary suspects, all of whom were laughing and joking about their situation, JR made the off-hand comment that "[t]hat officer hit me," Cook Aff. at ¶ 30; and (c)

ANDERER REFUSED TO GIVE A STATEMENT IN THE MATTER; there was enough evidence to support Chief Jones's decision to arrest Anderer for abuse. *See* Opinion at *10.

Furthermore, the majority improperly and without any legal authority, relies on Anderer's invocation of his contractual right to refuse a statement absent representation, and his resulting "failure" to give a statement, as support for their probable cause determination. Opinion at *10. Contrary to the reasoning employed by the MPD, the trial court, and now the majority; *no court of law has ever allowed or approved of using a suspect's exercise of his constitutional right to refuse to give a statement in a criminal investigation in which he is a suspect as a factor establishing probable cause.* In addition, Anderer was entitled to invoke his right to have a representative present during any questioning pursuant to his employment contract with the MPD; therefore, that request should not have been used or construed against him. Thus, there are *two* insurmountable hurdles and roadblocks, one constitutional and the other contractual, to the majority, district court, and MPD's attempt to use Anderer's refusal to give a statement as a factor establishing probable cause for his arrest. Indeed, what the MPD, district court, and majority accomplished was to unacceptably twist Anderer's invocation of his contractual rights as well as his inherent constitutional rights and use them against him as a basis for his arrest.

It is apparent that JR's statement alone was also not sufficient to establish probable cause, for, as the district court correctly found and I agree, it is well-settled that a claimant's allegation of criminal activity establishes probable cause to arrest *only* when "*it seems reasonable to believe [that person] is telling the truth.*" *Gramenos v. Jewel Co.*, 797 F.2d 432, 439 (7th Cir. 1986) (emphasis added). *AND*

HERE, FOR THE REASONS SET FORTH IN DETAIL HEREIN, AND ESPECIALLY CONSIDERING THE FACT THAT THE INNER LIP CUTS WERE NOT CONSISTENT WITH ANY EVIDENCE OF AN OUTSIDE BLOW OR TRAUMA TO THE FACE FROM A 200-LB. ADULT MALE, GIVEN THAT THERE WAS NO BRUISE, ABRASION, LACERATION MUCH LESS ANY OTHER SIGN OF TRAUMA TO THE OUTER SKIN OF HIS FACE OR NOSE, AND CONSIDERING THAT JR WAS FULLY CAPABLE AND HAD THE OPPORTUNITY, INTENTION, AND MOTIVE TO HARM HIMSELF AND OTHERS (ANDERER AND COOK) AS DIAGNOSED AND RECORDED BY THE CHILD PSYCHIATRIST DR. O'GRADY, it was *entirely unreasonable* for the police officers to arrest Anderer on the assumption that JR was truthful in launching the malicious and fictitious abuse allegation—at least without performing a proper investigation into the matter (which the police utterly failed to do).

Viewing all of these factors together as part of the total picture, as well as the law applicable thereto at this particular stage of the proceedings, it was indeed *unreasonable* that the police proceeded to arrest Anderer without conducting an adequate investigation (no physical or medical examination of JR) and without interviewing the relevant police and lay witnesses (and not just a select few) such as the citizen witness Mitchell and the officers who were witnesses at the alleged crime scene, *whom investigators well knew were available and able to give testimony exculpating Anderer*. As I have noted, Officers Centeno, Bohlen and Cook, as well as Mitchell, would have exonerated Anderer—but *not one of these witnesses were interviewed* prior to Anderer's arrest. We must ask ourselves: Why was not even one of the four exculpatory police witnesses or Mitchell timely interviewed?

But possibly, given the tenacity and haste with which Chief Jones repeatedly pursued both criminal and internal

charges against Anderer, in the face of the overwhelming amount of exculpatory evidence, it very well may be that the investigating officers were prodded by their Chief and/or other command officers into conducting an 'express track' investigation of officer (Anderer). Chief Jones's subsequent (post-arrest) treatment of Anderer's case, despite the mountain of evidence exonerating Anderer available to him in the decision making process, certainly reflected a most unusual and dogged determination to have Anderer prosecuted and discharged from the force, given that:

> (1) After the Deputy District Attorney Jon Reddin determined Anderer's charge would be "no processed," because it utterly "lacked prosecutable merit," ***Jones refused to accept that judgment and proceeded to reopen the criminal investigation into JR's accusations***—allegedly to ensure "the investigating officers had not missed any facts." Jones Aff. ¶ 10. In addition, although mentioned by Reddin in his no prosecute letter, any reference to alleged prior disciplinary actions taken against Anderer could and should not be considered under these circumstances;(2) although this re-investigation turned up "[n]o information . . . to further [a] criminal prosecution," Hoerig Aff., Ex. 1001 at 3, Chief Jones nonetheless had the temerity to ***request, after another fruitless investigation by Lt. Hoerig, that District Attorney E. Michael McCann re-evaluate Jon Reddin's prior decision not to press charges***;
>
> (3) McCann reaffirmed the prior decision not to prosecute, again concluding the criminal charge lacked prosecutable merit; in supporting his decision not to prosecute Anderer, McCann cited Reddin's original no-prosecute memo where Reddin stated: "I cannot say with any assurance what happened . . . . It is entirely conceivable . . . given [JR's] agitation, mental

problems and stated intentions to get money out of this incident, that he inflicted the injuries to himself." Arthur Jones Aff., Exh. 1002.

(4) then, just after Anderer filed the instant lawsuit on July 2, 2001, Chief Jones's IAD Commander, Steven Settingsgaard decided forthwith—without any new or additional evidence of Anderer's guilt—on July 6, 2001, ***to press internal charges (levied just 96 hours after Anderer filed suit against Jones and the case had laid dormant for a month) against Anderer for mistreatment of a prisoner, resulting in an order by Chief Jones to terminate Anderer***.

Viewed in light of Jones's own *unremitting determination* to prosecute and discharge Anderer for "abuse," the failure of investigators to conduct an adequate investigation prior to arresting Anderer (all at Jones's request), though no less unreasonable, is at the very least less surprising. Indeed, we must wonder if this type of unreasonable, careless and improper investigation (unfortunately) may have happened before at the MPD during the past few years. *See, e.g., Driebel*, 298 F.3d at 622.[30] This begs the following question: How

[30] The investigation techniques employed by the IAD investigators in this case may, at best, be described as shocking. Many of the potential witnesses in this case were subjected to intimidation and threats by IAD officers seeking to somehow gather evidence that would suggest Anderer had committed a crime. On the night of the alleged incident, Officers Cook and Logan were both asked to give a statement dealing with the criminal investigation of JR's allegations against Anderer. Both officers refused to make a statement until they were provided with a representative, as guaranteed them under the MPD rules and regulations. Neither were provided with representatives, but were threatened with a PI-21 (which would compel them to give a statement notwithstanding the denial of representation). Later that same night,

(continued...)

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[30] (...continued)
Cook was threatened with immediate suspension if he did not give a statement, and he relented. The first question asked of him was whether "Officer Shoman was involved with Officer Anderer." Cook Aff. ¶ 46. Cook told the investigators that he "did not know, nor was it germane to the subject." *Id.* Cook then asked that the investigators note that every answer he was giving was "under duress," which investigators failed to note on any of the documents included in the record. *Id.* at 49. Also, the next day, on April 18, 2001, Officer Logan requested that he have a representative present before answering any questions and was told that if he did not give a statement he would be "suspended until further notice." Logan Aff. ¶ 38. Logan then answered the IAD investigators' questions.

During Lt. Hoerig's second investigation into JR's allegations the same type of coercive and intimidating tactics were employed. Officers Shoman, Cook, Logan, and Anderer were all subjected to threats and coercion throughout the investigation. On June 12, 2001, Officer Shoman (invoking her contractual rights) also refused to make a statement without representation. Hoerig responded by bringing two sergeants in to compel Shoman to make statement. Shoman continued to refuse to make a statement without a representative and was threatened with suspension. Detective Harrison told her: "It's not worth your job." Shoman Aff. ¶ 34. After sitting in silence for 15 minutes Shoman finally broke down and said that she would give a statement, but requested that it be noted in the reports that *she was speaking "under duress."* *Id.* at 35. *At the end of the interview Officer Shoman indicated her displeasure with the proceedings and voiced her opinion that the entire investigation was "personal" and "crooked."* *Id.* at 48.

Officers Cook and Logan had similar experiences with the IAD officers during the second round of investigation. Under threat of suspension each eventually agreed to answer questions (however, it took 20 minutes of discussion and Cook offering his firearm to investigators as well as threats and coercion by the IAD before the officers caved in and talked). Both officers voiced their displeasure with the investigatory process: Cook stating that he *believed IAD*

(continued...)

many other officers, if any, were subjected to the same type of hurried and prejudicial rush to judgment and arrested without probable cause?

Perhaps the majority's ill-advised and less than complimentary statement insisting that my detailed discussion of the facts exonerating Anderer, combined with the inadequacy of the MPD's investigation "might present a persuasive closing argument," Opinion at *11 n.9, merely reflects the depth of their frustration over the fact that they are unable to overcome the overwhelming evidence of Anderer's lack of culpability and the important Constitutional questions raised in my dissent. Anderer, like every other citizen of the United States, is entitled to have his freedom from search and seizure vigorously protected by the courts and to be presumed innocent until proven guilty by a jury of his peers in a court of law; thus, the fact that he is a police officer does not mean that he is "relegated to a watered-down version of constitutional rights." *Driebel*, 298 F.3d at 637. And in this case, after reviewing the record as a whole and the law applicable thereto, I am convinced that the conduct of the IAD during the investigation into JR's abuse charge constituted an unreasonable and careless inquiry and that it amounted to nothing but an utter sham, pursued without regard for the truth and, in fact, was in violation of Anderer's Fourth and Fifth Amendment, as well as his contractual, rights. When the record is viewed as a whole and the evidentiary record construed in his favor as is required at this stage in the proceedings, it is apparent that Anderer has presented more than enough evidence to survive summary judgment, for it is clear that a reasonable juror could (and would) find, based on the undisputed facts Anderer has

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[30] (...continued)
and MPD command officers were out to "get" Anderer; and Logan stating that he believed that Anderer's termination was an act of "retaliation."

presented and the absence of evidentiary support to the contrary, that probable cause did not exist to arrest Anderer. *See Applebaum v. Milwaukee Metro. Sewerage Dist.*, 340 F.3d 573, 578-79 (7th Cir. 2003). Accordingly, I dissent from the majority's opinion and *URGE THAT THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT FOR DEFENDANTS BE REVERSED AND THIS CASE BE REMANDED TO THE DISTRICT COURT FOR TRIAL IN ORDER THAT ANDERER MAY BE ALLOWED TO PRESENT HIS CASE, IN ITS ENTIRETY, BEFORE A JURY OF HIS PEERS.*[31]

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[31] While I am of the opinion that the district court's decision granting summary judgment in favor of Jones and denying Anderer a trial on the merits of his claim that his constitutional rights were violated when he was arrested without probable cause was in error, I concur with the majority's decision on Anderer's First Amendment claim and need not discuss the issue.

In the
United States Court of Appeals
For the Seventh Circuit

No. 02-3669

JOSEPH R. ANDERER, JR.,

Plaintiff-Appellant,

v.

POLICE CHIEF ARTHUR JONES, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 01-C-668—J.P. Stadtmueller, *Judge.*

JUNE 21, 2005

Before FLAUM, *Chief Judge*, and POSNER, COFFEY, EASTERBROOK, RIPPLE, MANION, KANNE, ROVNER, WOOD, EVANS, WILLIAMS, and SYKES, *Circuit Judges*. Plaintiff-Appellant filed a petition for rehearing and rehearing en banc on October 18, 2004. In response to this petition, the panel amends its opinion as follows.

The first full sentence on page 10 of the slip opinion dated October 6, 2004 is deleted and replaced with:

> "Given these circumstances—a 12-year-old's bloody appearance and injuries consistent with being hit in the mouth, his consistency in reporting how he had been

injured, and that no other officer observed JR in that condition prior to turning him over to Anderer's sole custody[8]—we believe the Milwaukee police officers had probable cause to believe that Anderer had intentionally or recklessly caused JR's bodily injury. *See* Wis. Stat. § 948.03."

A majority of the judges on the panel voted to deny rehearing. Thereafter, Judge Coffey called for a vote on Anderer's petition for rehearing en banc and Chief Judge Flaum, with Circuit Judges Manion and Kanne, voted to grant rehearing en banc, but a majority of the active judges did not favor rehearing en banc. Accordingly, the petition is denied.

COFFEY, *Circuit Judge*, dissenting. This court has consistently held that police officers "are not relegated to a watered-down version of constitutional rights." *Anderer v. Jones*, 385 F.3d 1043, 1076 (7th Cir. 2004) (Coffey, J., dissenting) (quoting *Driebel v. City of Milwaukee*, 298 F.3d 622, 637 (7th Cir. 2002)). Nevertheless, the majority's reasoning and holding in *Anderer v. Jones* does just that. As recorded, the majority's opinion not only creates bad law, but more importantly violates the parameters of the Fourth and Fifth Amendments to the United States Constitution. 385 F.3d at 1043-53. Most striking is the majority's approval of the Milwaukee Police Department's ("MPD") attempt to force Anderer to give a statement while he was a suspect in a criminal investigation. Also, the utilization of Anderer's failure to respond to such questioning as a factor establishing probable cause constitutes a clear violation of his Fifth Amendment right to remain silent as well as his

contractual employment right not to give a statement without a representative present. Because I feel that this court has failed to fulfill its obligation under the Federal Rules of Appellate Procedure in denying Anderer a rehearing en banc, and has perpetuated a flawed decision recently handed down as precedent, I dissent from the denial of the petition for rehearing en banc. *See* FED. R. APP. P. 35 (stating that an en banc rehearing is favored in order to "secure or maintain uniformity of the court's decisions," or where "the proceeding involves a question of exceptional importance").

The Fifth Amendment to the Constitution states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. Like every other private citizen or criminal, law enforcement officers are likewise protected under the Fifth Amendment privilege against self-incrimination, which prevents the "government [from] forc[ing] a person to make a statement, even out of court, that might be used as evidence that he had committed a crime." *Atwell v. Lisle Park Dist.*, 286 F.3d 987, 990 (7th Cir. 2002). The right to remain silent under the Fifth Amendment is one that our founding fathers viewed, and to date we still view, as vitally important. As such, the parameters of this plenary right have remained intact over the last 226 years. *See, e.g., Hoffman v. United States*, 341 U.S. 479, 486 (1951); *accord Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892) (holding that the Fifth Amendment protection against self-incrimination "must have a broad construction in favor of the right which it was intended to secure"). The United States Supreme Court has recognized the breadth of this privilege in many, many decisions, the most recent being *Hiibel*, where the Court reiterated the principle that as long as a suspect has an "articulated real and appreciable fear that [the information sought might] be used to incriminate him, or 'would furnish a link in the chain of evidence needed to prosecute' him,"

the privilege attaches and must be honored. *See Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 124 S.Ct. 2451, 2461 (2004) (citing *Hoffman*, 341 U.S. at 486). No Supreme Court decision, nor any case law presented to this panel has ever held that a suspect in a criminal investigation's refusal to respond to a potentially incriminating, testimonial and compelled inquiry may be used to elevate mere reasonable suspicion to probable cause. *See id.* at 2460; *Tom v. Voida*, 963 F.2d 952, 959 n.8 (7th Cir. 1992).

Despite this clear and unambiguous mandate forbidding the use of a criminal suspect's silence against him, the district court, Judge J.P. Stadtmueller, presiding, proceeded to use Anderer's repeated refusals to answer any questions (as well as Anderer's refusal to speculate as to what caused JR's nosebleed) against him. The trial judge began by finding "THAT J.R.'S STATEMENT, BY ITSELF MAY NOT HAVE BEEN SUFFICIENTLY RELIABLE OR TRUSTWORTHY TO PROVIDE A BASIS FOR PROBABLE CAUSE." *Anderer v. Jones*, 342 F. Supp. 2d 799, 803 (E.D. Wis. 2002) (emphasis added). However, in a curious about-face, the trial judge then went on to impermissibly allow Anderer's refusal and "inability to explain J.R.'s nose bleed" (which in reality was a refusal to answer) to be used against him. *Id.* In concluding that the MPD had probable cause to arrest Anderer, the trial judge somehow found that "J.R.'s bloody nose, the time Anderer spent alone with J.R. [in the squad car (122 seconds)], *and Anderer's inability to explain the cause of J.R.'s bloody nose* [were] factors sufficient to supplement any possible lack of credibility in J.R.'s statement." *Id.* at 804 (emphasis added). This error in reasoning was damaging enough, but the mistake was compounded when the majority (without any citation of legal authority) approved of this flawed reasoning and once again incorporated Anderer's *REFUSAL TO ANSWER* against him as a factor when establishing probable cause.

The majority opinion, as originally written, states:

> Anderer offered no explanation to the investigating officers for how JR's injuries might otherwise have occurred, and appears only to have inquired about what JR claimed Anderer had hit him with. Given these circumstances—a 12-year-old's injuries and bloody appearance, his consistency in reporting how he had been injured, and *Anderer's total failure to provide any explanation for the injuries* when no other officer observed JR in that condition prior to turning him over to Anderer's sole custody—we believe the Milwaukee police officers had probable cause to believe that Anderer had intentionally or recklessly caused JR's bodily injury.

Anderer, 385 F.3d at 1050 (emphasis added). Not only does this passage incorrectly characterize the information in the record, as thoroughly discussed and documented in my dissent, *see Anderer*, 385 F.3d at 1075-76 (Coffey, J., dissenting), this holding is in strict contradiction of more than 200 years and volumes of case law which support Anderer's right to be protected from self incrimination. *See id.*; *see also Hoffman*, 341 U.S. at 486. After all, a person "may not be detained . . . without reasonable, objective grounds for doing so; and his refusal . . . to answer does not, without more, furnish those grounds." *Florida v. Royer*, 460 U.S. 491, 498 (1983) (citing *United States v. Mendenhall*, 446 U.S. at 556).

In an effort to defray and bypass the unconstitutional underpinnings of this approach the majority subsequently amended its original opinion. However, the majority's opinion, even with the newly incorporated changes, can only be interpreted as holding that a criminal suspect's refusal to answer in the face of questioning by law enforcement authorities may be used as a factor establishing probable cause. As changed, the paragraph, in pertinent part, reads:

> Anderer offered no explanation to the investigating officers for how JR's injuries might otherwise have

> occurred, and appears only to have inquired about what JR claimed Anderer had hit him with. Given these circumstances . . . we believe Milwaukee police officers had probable cause to believe that Anderer had intentionally or recklessly caused JR's bodily injury.

Majority Opinion (Revised 12/6/04) at *10. Thus, because even this majority's revised opinion, as written, continues to construe Anderer's silence against him as an element of probable cause—casting aside more than 200 years of clear and unambiguous case law—this court should not have gone on record as adopting this misapplication of the law and must somehow remedy this grievous error at the earliest possible opportunity. Anderer's repeated refusals to *speculate* as to the cause of JR's nosebleed were entirely consistent with his clearly established Fifth Amendment rights, and as such may not be used as a factor which would increase the "probability or substantial chance" that Anderer had committed a crime, thus elevating reasonable suspicion to probable cause. *Beauchamp v. City of Noblesville*, 320 F.3d 733, 743 (7th Cir. 2003).

Furthermore, not only did the majority's misapplication of Anderer's invocation of his Fifth Amendment right not to answer questions against him violate his constitutional rights, but this illegal invasion also ran afoul of Anderer's clearly enumerated contractual rights under his employment agreement with the Milwaukee Police Department. The MPD Rules and Regulations, Rule 3/450.05(D)(8) clearly mandates that: "*In an investigation that requires an immediate interview, the [officer] will be allowed a reasonable opportunity to obtain the presence of and to consult with a representative of his/her choice before and during the interview.*" However, an officer may be forced to give a statement by a supervising officer if, before being compelled to speak, that officer is told that he will receive "*immunity*

from criminal prosecution on the basis of [the answers given]." *Driebel*, 298 F.3d at 638, n.8 (quoting *Atwell*, 286 F.3d at 990).

Despite the fact that Anderer's request to consult with a representative of his choice was never granted, investigating officers from the Internal Affairs Division ("IAD") of the MPD attempted to coerce a statement from him, in clear violation of their own rules as well as Anderer's contractual rights. Indeed, at one point in the investigation IAD officers, in another attempt to get a statement out of Anderer, threatened that they were going to call a superior officer to "PI-21" him.[1] However, the IAD officers, in this instance, violated their own rules and regulations by failing to explain to Anderer that before being compelled to respond to questioning he would have to be granted immunity from criminal prosecution on the basis of any questions asked or responses given. *See Driebel*, 298 F.3d at 638; *see also Anderer*, 385 F.3d at 1074 (Coffey, J. dissenting) (citing MPD Rule 3/450.05 *et seq.*). Instead, IAD officers used the threat of initiating the "PI-21" procedure in an attempt to coerce Anderer into answering their questions before granting him immunity or furnishing him with a representative; all the while knowing that if Anderer had complied and given such a statement he would be waiving his Fifth Amendment, as well as his contractual, rights.

Knowing and understanding his rights, Anderer steadfastly refused to respond to questioning much less speculate as to what caused JR's spontaneous nosebleed, thus exercising a right reserved to him under the Fifth Amendment as well as his contract with the MPD. On another occasion,

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[1] Meaning that they were going to get a sergeant to compel and force Anderer to give a statement under threat of demotion, disciplinary action or even discharge. See MPD Rule 3/450.05 *et seq.*

when asked if he was willing to give a statement, Anderer patently and emphatically refused stating that he "absolutely [would] not, not without union representation." However, the IAD, the district court as well as the majority all saw fit to ignore Anderer's guaranteed rights under the Constitution, not to mention his contractual rights, and went so far as to use his repeated refusals to answer as a factor to elevate reasonable suspicion to the level of probable cause to arrest. This court's approval of such a double standard for a police officer undermines age-old precedent holding that police officers (even those accused of not abiding by the law) are not to be treated as second-class citizens and are likewise "not relegated to a watered-down" set of legal and constitutional rights. *Driebel*, 298 F.3d at 637. A holding, such as the majority's, is unacceptable and constituted a grave injustice that this court could and should have remedied in an en banc proceeding in order to "secure and maintain uniformity of the court's decisions" as proscribed by FED. R. APP. P. 35.

As mentioned above, the only legally cognizable grounds that the IAD had for arresting Anderer was their reliance on a fabricated statement as true from an unreliable, profane, disturbed and psychotic juvenile witness. *See, e.g., Anderer*, 385 F.3d at 1058 (prior to Anderer's arrest "Officer Shoman informed the IAD investigators that JR was a known trouble-maker who had proven to be a constant problem in her patrol area.") (Coffey, J. dissenting). However, based on JR's statement alone, the MPD was without sufficient reason to believe that Anderer had committed a crime and lacked probable cause to arrest him, thus constituting a clear violation of the Fourth Amendment to the United States Constitution.

The Fourth Amendment protects every United States citizen's right "to be secure in their houses, persons, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend IV. It is true that probable cause "is a

fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 231 (1983). Although probable cause is "incapable of precise definition or quantification into percentages," *Maryland v. Pringle*, 540 U.S. 366, 371 (2003), the Supreme Court has concluded that, *sin qua non*, "probable cause is a reasonable ground or belief of guilt." *Brinegar v. United States*, 338 U.S. 160, 175 (1949), *accord Carroll v. United States*, 267 U.S. 132, 161 (1925). This requires that we determine "whether [the] historical facts, viewed from the standpoint of an objectively reasonable police officer amount to . . . probable cause." *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

The question of whether the investigating police officers, when confronted with a completely unreliable witness, had a duty to investigate further is one of utmost importance. *See, e.g., Driebel*, 298 F.3d at 628; *see also* FED. R. APP. P. 35 (stating that an en banc rehearing is warranted where "the proceeding involves one or more questions of exceptional importance"). Indeed, the juvenile complainant's credibility was thoroughly undermined by a plethora of contradictory evidence as well as his display of uncontrolled, profane and psychotic behavior. *See, e.g., Driebel*, 298 F.3d at 628-32 (7th Cir. 2002); *see also Anderer*, 385 F.3d at 1082 (Coffey, J., dissenting) (quoting O'Grady Psychiatrist Report, Anderer Aff., Ex. 29 at 1) (Dr. O'Grady, a psychiatrist who had examined JR just a week before the incident stated in his report that the juvenile had been prescribed various medications for his present and documented psychiatric disorders (schizophrenia, depression and anxiety disorder) and had also been diagnosed as suffering from "paranoia and auditory hallucinations [in which] voices were telling him to harm himself, [and] others"). As the presiding trial court judge stated: "J.R.'s statement alone [was] an insufficient basis for probable cause . . . . After all, if J.R. could

manufacture one obvious lie (rape allegation) against an officer, he might also manufacturer a more plausible lie against a different officer." *Anderer*, 342 F. Supp. 2d at 802-03. However, instead of continuing their investigation after being made aware of JR's unreliability—as officers are required by law to do—the IAD investigators proceeded to ignore the exculpatory statements of witness Officer Shoman and systematically failed to timely interview a number of others[2] prior to arresting Anderer. *See Spiegel v. Cortese*, 196 F.3d 717, 723-24 (7th Cir. 1999).

It is uncontroverted that throughout his encounter with the police on April 17, 2001, JR acted in an out-of-control manner that suggested he was a very (psychologically and emotionally) troubled individual. For example, prior to levying his assault accusation against Anderer, JR had repeatedly accused another officer, Officer Cook, of attempting to "rape" him, which was a wild and completely unsupported claim.[3] The trial judge, Judge Stadtmueller, recognized the import of this baseless accusation when he stated: "Anderer raises serious issues concerning J.R.'s credibility by showing that J.R. made fanciful allegations against another officer." *Anderer*, 342 F. Supp. 2d at 803. Also, JR, rather than continuing to assert his ridiculous accusation against Cook that he had been "raped," later changed his tune when talking to IAD investigators and admitted that he had only been "nudged" with a flashlight; a turn of events that also helps serve to undermine JR's credibility, as well as the unsupported conclusion of the IAD

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[2] These witnesses include Officers Cook, Centeno, Logan and Bohlen, and one lay witness, Mitchell; all of whom would have exonerated Anderer.

[3] The record shows that what in fact happened was that Cook "nudged him on his buttock with a flashlight," see *Anderer*, 385 F.3d at 1068 (Coffey, J., dissenting); a far cry from the "rape" accusation which JR repeated to a number of officers.

and the majority that JR was "consistent in reporting how he had been injured." *Anderer*, 385 F.3d at 1050. In addition, JR, when initially interviewed, stated that he had been struck in the face as he was entering Anderer's police vehicle at the marina, but subsequent to Anderer's arrest changed this part of the fabrication also and now stated that, during the drive to the District 2 station, Anderer had "stopped the car," got out of the driver's seat, "opened the back door" and proceeded to strike him in the face. *Id.* at 1046. The reality of the situation is that the officers were dealing with a rambling, psychotic and delusional child who had recently been diagnosed as experiencing "PARANOIA AND AUDITORY HALLUCINATIONS [IN WHICH] VOICES WERE TELLING HIM TO HARM HIMSELF, OR TO HARM OTHERS." *See Anderer*, 385 F.3d at 1082 (Coffey, J. dissenting) (citing O'Grady Psychiatrist Report, Anderer Aff., Ex. 29 at 1 (emphasis added)). With reference to the doctor's report, it makes sense that JR would harm either himself or attempt to harm officers by making spurious "rape" allegations against one officer, Cook, and claiming that another officer, Anderer, had hit him.

In addition to making these ridiculous allegations against Cook, as well as being inconsistent in his recitation of the events of that night, the evidence in the record establishes that JR was not a credible or trustworthy witness. JR displayed no physical signs of injury whatsoever anywhere on his face which fails to establish that he had been hit or struck or assaulted in any manner by a 200 lb. police officer. *See id.* at 1072 (Coffey, J., dissenting). In addition, his aggravated, out-of-control conduct and suspicious demeanor that night should have rendered his recitation of the alleged events of that evening completely unreliable, thus requiring a reasonable officer to investigate further. *See Hebron v. Touhy*, 18 F.3d 421, 422-23 (7th Cir. 1994) ("Sometimes information from or about a person claiming to be the victim of crime would lead a reasonable officer

to be suspicious, making further investigation prudent—and because the 'reasonableness' standard of the fourth amendment [sic] links the constitutional obligation to the standard of prudent conduct, the officer must do more.").

Indeed, MPD officers had ample information that night that should have completely destroyed JR's credibility, to name just two: (a) that JR was supposed to be taking no less than three psychotropic drugs at the time of his arrest; and (b) that he had failed to take his medication that day, making him a menace and possible danger to himself and others. *See Anderer*, 385 F.3d at 1058 n.3 *and accompanying text* (Coffey, J., dissenting). The record clearly establishes the fact that officers knew that JR had been prescribed, and was supposed to have been ingesting, a variety of psychotropic medications, and that he had failed to take those medications that very day. *Id.* at 1046.[4] Also, when contacted, JR's mother urged officers to "release[ ][him] from custody as soon as possible in order that he might ingest his medication immediately." *Id.* at 1058 (Coffey, J., dissenting). The majority contends that "the fact that investigating officers knew about JR's [psychotropic] medication does not *ipso facto* negate JR's credibility or require the officers to further investigate." *Id.* at 1050. However, the majority's argument is a red herring. JR's failure to take his psychotropic medications that evening certainly should have alerted the allegedly intelligent, well-trained and seasoned investigating officers to the fact that a more detailed and thorough investigation into JR's

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[4] Subsequent to JR having made his spurious allegations against Anderer, Cook called JR's mother to inform her that her son was in custody. *Id.* While talking with Cook, "JR's mother admitted that she was not surprised that JR had been arrested for burglary and advised Officer Cook that JR was taking several prescription medications, including two that Officer Cook recognized as pills to 'help control a person's mental state.'" *Id.*

allegations was necessary given the disturbed mental state of the purported victim witness they were dealing with. Also, when JR's failure to take his psychotropic medicines is viewed in light of all the wealth of other evidence undermining his credibility—such as: (1) his spurious rape allegations against Officer Cook; (2) the lack of any physical evidence suggesting that he had been injured in any way; (3) the lack of any evidence corroborating JR's version of events; and (4) his inconsistency in reporting the alleged abuse—JR's mental status, failure to take his medicine that day and out-of-control behavior certainly establish that *JR was patently untrustworthy, unreliable and certainly not credible as a witness or believable as a purported victim*.

It is true that "*as long as a reasonably credible witness or victim informs the police that someone has committed, or is committing, a crime, the officers have probable cause to place the alleged culprit under arrest*." *Spiegel*, 196 F.3d at 723 (emphasis added). This most assuredly was not the case here; JR was not a reasonably credible witness. The trial court so found in holding that "J.R.'s statement, by itself, may not have been sufficiently reliable or trustworthy to provide a basis for probable cause." *Anderer*, 342 F. Supp. 2d at 803. Therefore, because JR was not a credible witness, the IAD's investigating officers were, by law, required to conduct further investigation into JR's allegations of abuse; and if they had, the IAD would have discovered and been convinced beyond a shadow of a doubt that Anderer had not committed any crime. *See Beauchamp*, 320 F.3d at 743.

The great weight of the evidence in this case, including the sworn statements of six police officers and one lay witness, establishes the fact that Anderer did not strike JR at any time on the evening of April 17, 2001. Indeed, not one living, breathing human being was ever found that could corroborate JR's fabricated claim that he had been struck by Anderer. Had investigators done what is legally (and ethically) required of them and investigated the matter

in a more thorough manner (instead of conducting what can only be described as an orchestrated and preconceived cursory inquiry), they would have uncovered a wealth of evidence exonerating Anderer. At the marina, where JR claimed he was struck by Anderer, lay witness James Mitchell observed the totality of Anderer's interaction with JR, and stated that he: "Watched every step of the way while Officer Anderer was taking [JR] to his squad car [and as] Officer Anderer guide[d] [JR] into the back seat of the squad, [he] saw Officer Anderer seatbelt JR, close the door securing him in the back of the squad and . . . [a]t no time did [he] see Officer Anderer strike [JR] or act in any abusive manner toward him . . . [instead, Mitchell commented that] at all times . . . Anderer acted in a very professional manner [towards JR]." *Anderer*, 385 F.3d at 1084 (Coffey, J., dissenting). In addition, six police officers testified that they did not observe Anderer abuse or even yell at JR, much less punch him in the face as he was being put into the police conveyance (as was claimed by the abusive, foul-mouthed and out-of-control JR). For instance, Officer Bohlen, who was on the scene and had "a direct vantage point" failed to "notice anything out of the ordinary when Officer Anderer placed JR in his squad." *Id.* (Coffey, J. dissenting). Also, Officer Cook testified that Anderer had not "encountered any difficulty placing JR into his squad," adding that he "would have been in a position to have noticed any such commotion." *Id.* at 1086 (Coffey, J. dissenting).

If the MPD had performed a legally sufficient and unbiased investigation prior to Anderer's arrest, they would have learned from the officers on the scene that Anderer did not, at any time, strike or even raise his voice at JR before placing him in the squad car at the marina. Based on nothing more than pure speculation and conjecture the District Judge J. P. Stadtmueller stated (and the majority joined in the speculation) that Anderer may have hit JR

sometime after leaving the marina by citing "the time in which JR was alone with Anderer in Anderer's car," as one of the circumstances which established probable cause. *Anderer*, 342 F. Supp. 2d at 803. The majority, as stated earlier, somehow perpetuated this grave error in judgment by relying on the fact that "no other officer observed JR [bleeding] prior to turning him over to Anderer's sole custody" as a reason "to believe that Anderer had intentionally or recklessly caused" JR to bleed. *Anderer*, 385 F.3d at 1049-50. However, the fact is that the record establishes, in no uncertain terms, that Anderer arrived at the police station, with JR secured in the back of his squad car, a mere 122 seconds after leaving the marina. *Id.* at 1081 (Coffey, J., dissenting). This extremely limited period of time falls far short of the amount of time necessary for Anderer to stop the squad car, turn off the ignition switch, remove the key from the ignition, unfasten his seatbelt, open the driver's side door, exit the vehicle, close the front door, open the rear door, proceed to hit the juvenile, close the rear door, reopen the front door, reenter the vehicle, re-fasten his seatbelt, insert and turn the key, and start the engine within 122 seconds, much less proceed to the station in addition within that period of time as JR claimed was the sequence of events after Anderer's arrest. Therefore, it is both inaccurate and disingenuous for the majority to speculate, as the trial judge did, and state that Anderer could have struck JR while conveying him to the District 2 police station when all recorded evidence, not to mention the evidence available to the MPD at the time (recall that JR did not say that he had been struck while in the car until after Anderer's arrest), suggests that this is impossible.

Probable cause to arrest Anderer was not established. To make matters worse, if the IAD had performed an independent and unbiased investigation, command officers and

the Chief of Police, Arthur Jones, would have realized not only that there was insufficient grounds to arrest Anderer, but that he (Anderer) was innocent. This conclusion is bolstered by the decision of the Milwaukee County District Attorney's office not to press charges against Anderer. In a memo dated June 7, 2001, Assistant District Attorney Jon Reddin stated:

> I have interviewed [JR], Anderer, officers Janice Shoman, Jeff Cook and Jeff Logan, and civilian James Mitchell. Based on those interviews I have concluded that we cannot prove how and by whom [JR]'s injuries were incurred, and consequently [I conclude that] no criminal charges can be sustained. . . . Whether Anderer struck him or he inflicted the injuries to himself by smashing his face into something in the back of the car will probably never be known to anyone but [JR] and Anderer. I cannot say with any assurance what happened. I believe it more probable, particularly in view of my knowledge of prior complaints against Anderer, that Anderer did strike [JR]. It is entirely conceivable, however, given [JR]'s agitation, mental problems and stated intentions to get money out of this incident, that he inflicted the injuries to himself."

Id. at 1062 (Coffey, J., dissenting). Not satisfied with this independent and unbiased result, the MPD's Chief Jones personally requested that District Attorney E. Michael McCann himself review the decision of his first assistant and, upon subsequent review, the District Attorney ratified Reddin's decision without further comment. *Id.* (Coffey, J., dissenting) This reluctance on the part of the District Attorney's office to find any legally sufficient basis for pressing charges in the complaint against Anderer is merely further evidence: (a) that the IAD failed to perform a good-faith investigation and instead conducted a result-driven,

pre-ordained sham investigation to disgrace Anderer; (b) that given JR's lack of credibility and trustworthiness the IAD should have investigated further due to the unreliability of the only witness, in which case, they would have uncovered evidence exonerating Anderer; and (c) that the information gained did not rise to the level of establishing probable cause to arrest Anderer.

I fully understand that the law does not require that, in every case, "a police officer conduct an incredibly detailed investigation at the probable cause stage," *Spiegel*, 196 F.3d at 724-25. However, a more thorough investigation was required here and, if accomplished in an independent and unbiased manner, would have conclusively established that probable cause to arrest Anderer did not exist. The IAD's failure to further investigate is a black mark on the MPD and violated Anderer's Fourth Amendment right to be secure in his "person[], papers, and effects, [as well as] against unreasonable searches and seizures." U.S. CONST. amend IV.

The majority's opinion (385 F.3d 1043), as written, creates bad law and violates Anderer's Fourth and Fifth Amendment rights as well as his contractual employment rights and should not be allowed to stand as precedent. The decision by this court to allow the majority's opinion to stand will undoubtedly cause concern and confusion on the part of law enforcement officers and the bar throughout this circuit. Police officers serve a vitally important function in our society and are entitled to the same constitutional protections as all United States citizens. The majority's endorsement of the denial of Anderer's protections under the Fourth and Fifth Amendments, as well as those guaranteed in his contract of employment, allows for the treatment of officers as second-class citizens. Thus, following the dissemination of this decision, law enforcement personnel will undoubtedly be concerned that, simply by doing their job and relying on the rights guaranteed them by the

Constitution and contract, they will be susceptible to arrest and/or termination without good cause.

A situation of this nature is unacceptable, and it is for these reasons that I am forced to object to the denial of a rehearing en banc. As noted above, a rehearing is favored: (a) in order to "secure or maintain uniformity of the court's decisions," or (b) where "the proceeding involves a question of exceptional importance." FED. R. APP. P. 35. In this case, both of these criteria—maintenance of uniformity and exceptional importance—should have warranted that the entire court consider the record and thoughtfully evaluate whether Anderer was entitled to his day in court in this case. The majority's decision supports an emasculation of over 200 years of criminal and constitutional law and must not be promulgated as precedent. Thus, an en banc hearing would have served the purpose of allowing the entire court to resolve the ambiguity which this decision has undoubtedly created for law enforcement officers and the bar throughout this circuit.

I respectfully dissent from the court's erroneous decision to allow the majority's decision in this case to stand as written.

No. 02-3669 19

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOSEPH R. ANDERER, JR.,

Plaintiff,

v. Case No. 01-C-0668

CHIEF ARTHUR L. JONES,
DEPUTY INSPECTOR CHARLES I.
GRISHAM, LT. DETECTIVE
MARY K. HOERIG, DETECTIVE
MERCEDES COWAN, and
CITY OF MILWAUKEE,

Defendants.

ORDER

(Filed Sept. 30, 2002)

Plaintiff Joseph R. Anderer, Jr. ["Anderer"], a former police officer employed by the City of Milwaukee, filed a complaint against the defendants pursuant to 42 U.S.C. § 1983, alleging that the defendants violated his Fourth and Fourteenth Amendment rights by arresting him without probable cause and his First Amendment rights by suspending him based upon statements that he made to the media following his arrest. The defendants have filed a motion for summary judgment, and the plaintiff has responded. For the reasons stated below, the court will grant the defendants' motion for summary judgment.

BACKGROUND

On April 17, 2001, Anderer, who was employed as a police officer for the City of Milwaukee, was dispatched to the Pump House Marina along the Milwaukee River in response to multiple citizen complaints that four juveniles had broken into several boats in the marina. After arriving at the scene, Anderer, in the company of two other police officers, apprehended the four juveniles. Three of the juveniles were placed in the squad car driven by the officers accompanying Anderer. The fourth juvenile, referred to as "J.R.," was placed in Anderer's squad car. All four juveniles were transported to the station house.

Upon arriving at the station house, a fourth officer removed J.R. from Anderer's squad car and noticed that J.R. had blood on his shirt and pants. The officer questioned J.R. as to the source of the blood. J.R. pointed to Anderer and alleged that Anderer hit him. An internal affairs investigation was initiated within the hour. Later that night, Anderer was arrested for physical abuse of a child and placed in jail for the remainder of the night. Anderer was released from jail the next day, suspended from the police department, and the matter was turned over to the Milwaukee district attorney's office for a determination as to whether Anderer would be prosecuted for the alleged juvenile assault. The district attorney eventually decided not to prosecute. The local media covered both J.R.'s arrest and the district attorney's decision not to prosecute. Media coverage reported the plaintiff's statements that he would retain an attorney.

DISCUSSION

Summary judgment is appropriate where the movant establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "Material facts" are those facts which "might affect the outcome of the suit," and a material fact is "genuine" if a reasonable finder of fact could find in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate where a party has failed to make "a showing sufficient to establish the existence of an element essential to that party's case and on which the party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 256-57. A party opposing summary judgment may not rest upon the mere allegations or denials of the adverse party's pleading, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). Any doubt as to the existence of a material fact is to be resolved against the moving party. *Anderson*, 477 U.S. at 255 (1986).

A. Fourth and Fourteenth Amendment Claim

The Fourth Amendment requires that all warrantless arrests be "reasonable," *Woods v. City of Chicago*, 234 F.3d 979, 995 (7th Cir. 2000), *cert. denied*, 122 S. Ct. 354 (2001), *citing Payton v. New York*, 445 U.S. 573, 585 (1980), an inquiry that depends on whether the arresting officer had probable cause to believe that the suspect had committed or was committing an offense. *Woods*, 234 F.3d at 995. "There is probable cause to arrest if the totality of the facts and circumstances known to a reasonable arresting officer would support the belief that the suspect has committed or is committing a crime." *Driebel v. City of Milwaukee*, 298

F.3d 622, 643 (7th Cir. 2002) (citations omitted). Probable cause "requires more than bare suspicion but need not be based on evidence sufficient to support a conviction, nor even a showing that the officer's belief is more likely true than false." *Woods*, 234 F.3d at 996 (citation omitted). Furthermore, "an identification or a report from a single, credible victim or eyewitness can provide the basis for probable cause." *Driebel*, 298 F.3d at 643, *citing Woods*, 234 F.3d at 996. So long as the police have probable cause, they have no constitutional obligation to conduct a further investigation before making an arrest, even if sound police technique would have required such further investigation. *Woods*, 234 F.3d at 997, *citing Gramenos v. Jewel Cos., Inc.*, 797 F.2d 432, 440 (7th Cir. 1986); *Spiegel v. Cortese*, 196 F.3d 717, 725 (7th Cir. 2000) ("The inquiry is whether an officer has reasonable grounds on which to act, not whether it was reasonable to conduct further investigation.") (citation omitted).

The defendants argue that they had probable cause to arrest Anderer based upon J.R.'s statement that Anderer hit him, J.R.'s bloody nose, the period of time in which Anderer was alone with J.R. in his squad car, and Anderer's inability to explain the cause of J.R.'s nose bleed. Anderer argues that J.R. is not a credible witness because he made a baseless accusation of rape against another officer at approximately the same time he accused Anderer of hitting him.[1] Anderer argues that J.R.'s credibility is

[1] For the purposes of this summary judgment motion, the court accepts as true Anderer's statement that J.R. accused another officer of rape and the court further draws the inference in favor of Anderer that J.R.'s accusation of rape is untrue. *See Anderson*, 477 U.S. at 255 (1986) (stating that the court must resolve any doubt as to the existence of a material fact against the moving party and draw all reasonable

(Continued on following page)

further weakened because J.R. admitted breaking into boats, that one of the officers knew J.R. to have a smart mouth, and because J.R. used profanity and swore several times at the officers. Anderer also argues that no other witness at the marina can corroborate J.R.'s allegation that Anderer hit him while placing J.R. into the squad car. In addition to attacking J.R.'s credibility, Anderer argues that although J.R. had a bloody nose, his face did not show any sign of trauma (e.g. there was no bruising) other than a split lip on the inside of J.R.'s mouth which may have been consistent with a crack caused by a dry lip, a bit lip, or a canker sore. Anderer admits that he was alone with J.R. for a period of time but denies that the period of time is relevant in light of J.R.'s statement that Anderer hit him while placing J.R. into the squad car. Anderer also admits that J.R. had a bloody nose and that Anderer could not explain what caused J.R.'s nose to bleed.

J.R.'s statement alone is an insufficient basis for probable cause. As the case law in this circuit emphasizes, the statement of one witness or victim is a sufficient basis for probable cause only where that witness is credible or the information is trustworthy. *See Driebel*, 298 F.3d at 643, *quoting Woods*, 234 F.3d at 996 ("[A] report from a single, *credible* victim or eyewitness can provide the basis for probable cause.") (emphasis added); *Pasiewicz v. Lake County Forest Preserve District*, 270 F.3d 520, 524-25 (7th Cir. 2001) (finding probable cause where there was no indication that two eyewitnesses were lying or that their information was not credible or accurate); *Hebron v.*

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inferences in favor of the non-movant). The inference that J.R.'s allegation of rape is untrue is reasonable because the officer accused of rape was never alone with J.R.

Touhy, 18 F.3d 421, 422-23 (7th Cir. 1994) (holding that a statement by evicted tenants against their former landlord, against whom they might bear a grudge, is not sufficiently reliable to support probable cause and that police must accumulate more evidence to support an arrest); *Sheik-Abdi v. McClellan*, 37 F.3d 1240, 1247 (7th Cir. 1994) (finding probable cause based on the uncorroborated statement of a paramedic where the officers had no basis to disbelieve the statement); *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 439 (7th Cir. 1986) (finding probable cause based on the uncorroborated statement of a grocery store security guard and stating that "[a] 'prudent' officer may balk if the person claiming to be an eyewitness strolls into the police station and describes a crime from long ago, or if the person leveling the accusation is babbling or inconsistent. When an officer has 'received information from some person – normally the putative victim or an eyewitness – *who it seems reasonable to believe is telling the truth*,' *Daniels v. United States*, 393 F.2d 359, 361 (D.C. Cir. 1968), he has probable cause.") (emphasis added). Anderer raises serious issues concerning J.R.'s credibility by showing that J.R. made fanciful allegations against another officer. After all, if J.R. could manufacture one obvious lie against an officer, he might also manufacture a more plausible lie against a different officer. Without more than J.R.'s word, therefore, issues of fact exist as to whether a reasonable officer would have concluded there was probable cause to arrest Anderer.

The court pauses to note that Anderer's other bases for attacking J.R.'s credibility are not persuasive. Lying and burglary do not necessarily go hand in hand, especially where a burglar admits that he burgled. Robin Hood, after all, was an honest thief. Neither is J.R.'s youth

a basis to disbelieve his allegation. *See Gerald M. v. J. Conneely,* 858 F.2d 378, 380-81 (7th Cir. 1988) (finding probable cause based upon an uncorroborated ten-year-old's statement). Finally, J.R.'s "smart mouth" and use of profanity directed toward the officers cuts against Anderer: use of profanity, though impolite, does not hurt J.R.'s credibility but it does suggest a reason why an officer might backhand a suspect.

Although the court determines that J.R.'s statement, by itself, may not have been sufficiently reliable or trustworthy to provide a basis for probable cause, the surrounding circumstances, including blood on J.R.'s face and shirt and the time in which J.R. was alone with Anderer in Anderer's squad car, would have given a prudent police officer probable cause to arrest Anderer. Unlike J.R.'s allegation of rape against another police officer who had not spent any time alone with J.R., J.R.'s statement that Anderer hit him was consistent with the blood on J.R.'s face and shirt. The presence of the blood, as well as the time in which Anderer was alone in his squad car with J.R. and Anderer's inability to explain J.R.'s nose bleed, are not facts in dispute. To be sure, these facts alone do not establish that, more likely than not, Anderer actually hit J.R., but that is not the standard for probable cause. *See Driebel,* 298 F.3d at 643, *quoting Woods,* 234 F.3d at 996 (an officer's belief in the existence of probable cause "need not be based on evidence sufficient to support a conviction, nor even a showing that the officer's belief is more likely true than false"). J.R.'s statement, as unreliable as it may have been, the blood, the opportunity that Anderer had to hit J.R., and Anderer's inability to explain the cause of J.R.'s nose bleed, creates more than "bare suspicion" that Anderer hit J.R. *See Woods,* 234 F.3d at

996 (citation omitted). Based on the undisputed facts and the totality of the circumstances, the court finds that the defendants had probable cause to arrest Anderer.

Anderer alleges that an issue of fact exists as to whether J.R.'s injuries were consistent with being punched. Anderer presents affidavits from Identification Technicians who took pictures of J.R.'s injuries. (Brown Aff. at ¶¶ 4-6, 15-18, 24; Kathrein Aff. at ¶¶ 12-16, 24-5.) These witnesses state that there were no signs of trauma (e.g. no bruising) on J.R.'s face other than a cut on his inner lower lip which is consistent with a crack caused from a dry lip, a bit lip, or a canker sore. *Id.* Even without any bruising, however, J.R.'s bloody nose and split lip are marks sufficient to indicate that J.R. may have been hit. *Cf. Sheik-Abdi*, 37 F.3d at 1247 (finding probable cause based on paramedic's uncorroborated testimony that suspect struck his wife with his forearm even though the victim bore no contemporary markings of bodily harm). Along with the other factors mentioned above, probable cause requires no more.

Additionally, once an arresting officer has probable cause, the officer is not compelled by the Fourth Amendment to investigate the matter further before making an arrest. *See Woods*, 234 F.3d at 997 (citations omitted). Anderer alleges that the police should have investigated J.R.'s statement and his injuries more thoroughly before arresting Anderer. Specifically, Anderer alleges that the police officers did not thoroughly interview all of the possible witnesses at the marina, and the officers did not closely analyze J.R.'s injuries or send him to a doctor for an evaluation. Anderer also alleges that none of the witnesses at the marina who were interviewed saw Anderer hit J.R. Because the police officers already had

probable cause without taking these steps, further investigation was not required under the Fourth Amendment. *Id.; Pasiewicz,* 270 F.3d at 525 ("Although the officers might have saved a law-abiding citizen considerable tumult by asking more questions or digging deeper into the case, the Fourth Amendment did not require them to do so."); *Spiegel v. Cortese,* 196 F.3d 717, 725 (7th Cir. 2000) ("The inquiry is whether an officer has reasonable grounds on which to act, not whether it was reasonable to conduct further investigation.") (citation omitted); *Gramenos,* 797 F.2d at 442 ("[P]olice need not automatically interview available witnesses, on pain of the risk that a jury will require them to pay damages. Good police practice may require interviews, but the Constitution does not require police to follow the best recommended practices."). Even though no interviewed witness at the marina saw Anderer hit J.R., J.R.'s bloody nose, the time Anderer spent alone with J.R., and Anderer's inability to explain the cause of J.R.'s bloody nose are factors sufficient to supplement any possible lack of credibility in J.R.'s statement. An eyewitness account corroborating J.R.'s statement is not the only means by which the credibility of J.R.'s statement may be bolstered.[2]

In a suit for damages, if the bases for probable cause involve disputed issues of fact, they may be appropriately decided by a jury. *See Sheik-Abdi v. McClellan,* 37 F.3d 1240, 1246 (7th Cir. 1994); *Maxwell v. City of Indianapolis,*

[2] In fact, the parties dispute whether certain witnesses at the scene actually saw Anderer place J.R. into the squad car. (See, e.g., M. Jones Aff. at ¶ 3) (stating that he did not see any juvenile placed into any squad car). Eyewitness corroboration from certain witnesses that Anderer hit J.R. while placing him in the squad car, therefore, may not even have been possible.

998 F.2d 431, 434 (7th Cir. 1993); *Llaguno v. Mingey*, 763 F.2d 1560, 1565 (7th Cir. 1985) (*en banc*) (*plurality opinion*); *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1346-47 (7th Cir. 1985). *But cf. Gramenos*, 797 F.2d at 438 (stating that *Llaguno* and *Moore* were unusual cases). In this case, however, the factors which bolster the credibility of J.R.'s statement, and which establish probable cause, are not disputed, and summary judgment is appropriate. *See Maxwell*, 998 F.2d at 434 ("If the underlying facts supporting the probable cause determination are not in dispute, the court can decide whether probable cause exists.") (citations omitted).[3]

B. First Amendment Claim

Anderer alleges that Chief Jones and the defendant City reopened a criminal investigation against Anderer after a Milwaukee County Deputy District Attorney decided not to prosecute Anderer in connection with J.R.'s allegations. Anderer argues that Jones' decision to reopen an investigation was retaliation against Anderer for statements made by Bradley DeBraska, the Milwaukee Police Association ["MPA"] President, to a television reporter that Anderer was arrested without probable

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[3] The court adds one last comment regarding a minor theme mentioned briefly in Anderer's brief and in the television broadcast which Anderer attaches to his brief: Anderer's allegation that one of the internal affairs detectives had a grudge against Anderer related to some previous dispute does not affect the court's probable cause analysis. *See Gerald M.*, 858 F.2d at 381 ("If probable cause exists, an arrest is not tainted because a police officer may dislike one of the actors in the underlying dispute, unless this is shown to be an important factor in the decision."). Anderer has not offered anything but innuendo and speculation on this point.

cause and that the MPA hoped that Anderer would sue the department.

The court need not determine whether statements made by DeBraska implicate Anderer's First Amendment rights because the court determines that DeBraska's statements are not protected by the First Amendment. The speech of a government employee warrants First Amendment protection if that speech "addresses a matter of public concern." *Connick v. Myers*, 461 U.S. 138, 147 (1982). Whether the employee's speech falls under the rubric of public concern must be determined "by the content, form, and context of a given statement, as revealed by the record as a whole." *Id.* at 147-48. Of these three factors, the content of the speech is most important. *See Campbell v. Towse*, 99 F.3d 820, 827 (7th Cir. 1996).

Neither the statements made to the media, nor Anderer's subsequent lawsuit, address a matter of public concern; rather, the statements and Anderer's lawsuit merely address a private personnel dispute. Although the topic of arrest without probable cause involves a liberty interest important to our society, Anderer does not show any facts which demonstrate "pervasive or systematic" misconduct by the defendants. *See Yatvin v. Madison Metropolitan School District*, 840 F.2d 412, 420 (7th Cir. 1988) (finding that a sex discrimination lawsuit did not address a matter of public concern where it was indistinguishable with a "run-of-the-mine single-plaintiff discrimination case" and where it did not seek relief against "pervasive or systematic misconduct"); *Berndt v. Jacobi*, 781 F. Supp. 553 (N.D. Ill. 1991) (finding that a police officer's lawsuit did not involve a matter of public concern where officer merely alleged one instance of improper discipline). In *Berndt*, a police officer alleged that he was

improperly disciplined for failing to arrest someone without probable cause. 781 F. Supp. at 559. Although the officer's claim in *Berndt* implicated the same Fourth Amendment liberty interest which is implicated in the case at bar, the district court found that a single occurrence of unfair discipline did not show the "pervasive and systematic misconduct" necessary to trigger First Amendment protection. *Berndt*, 781 F. Supp. at 559-60, *citing Yatvin*, 840 F.2d at 418.

In this case, Anderer argues that DeBraska's statements had a direct bearing on police protection and safety in the City of Milwaukee by referring to a television newscast in which several Milwaukee Police Department officers indicated that they were afraid to work, especially burglary investigations, because they could become the target of an internal police investigation. (Plaintiff's Response to Defendants' Motion for Summary Judgment, at 75.) Anderer's argument, however, misses the point. Anderer must show how his speech or lawsuit, rather than the means of retaliation, involves underlying issues which could involve police protection or public safety. *See Auriemma v. Rice*, 910 F.2d 1449, 1460 (7th Cir. 1990) (*en banc*) ("It would be difficult to find a matter of greater public concern in a large metropolitan area than police protection and public safety."); *Milazzo v. O'Connell*, 925 F. Supp. 1331, 1345 (N.D. Ill. 1996) (finding that plaintiff failed to show that consultation with an attorney addressed a matter of public concern where plaintiff, arguing that retaliation may have a chilling effect, did not show that any other employees were in a position to sue on a matter of public concern). Anderer does not show or even allege that the police department pervasively and systematically arrests other people without probable cause. It is,

therefore, difficult to imagine how statements that he, personally, was arrested without probable cause raises an issue that affects police protection or public safety in general. *Berndt* makes this same point by distinguishing *Auriemma* with the officer's lawsuit based on a single occurrence of unfair discipline:

> *Auriemma* dealt with questions regarding the quality of the entire police force of the City of Chicago. In *Auriemma,* the plaintiffs alleged that wholesale changes in the highest police echelons had been made solely on a racial basis rather than on merit. Unlike Berndt's suit against Evanston, *Auriemma* actually dealt with pervasive and systematic misconduct, misconduct that could have endangered the public safety of a large metropolitan area.

Berndt, 781 F. Supp. at 560.

The court notes that media coverage of DeBraska's statements is relevant to, but not dispositive of, public concern. *See Zorzi v. County of Putnam,* 30 F.3d 885, 897 n.11 (7th Cir. 1994). As *Zorzi* states,

> [I]t is important not to equate the public's curiosity about a matter with the matter having societal ramifications. People may be interested in any number of aspects of the lives of public officials and employees, but that does not mean that such matter [sic] have societal ramifications. Conversely, the public may be extremely apathetic about certain matters of public concern. . . .

30 F.3d at 897 n.11, *citing Belk v. Town of Minocqua,* 858 F.2d 1258, 1263 n.7 (citation omitted). In other words, DeBraska's statements do not address matters of public

concern merely because they were aired in a television broadcast.

The court also notes that, like media coverage, Anderer's motive in authorizing DeBraska's speech is relevant to, but not dispositive of, public concern. *See Gustafson v. Jones,* 290 F.3d 895, 908 (7th Cir. 2002). The fact that a plaintiff may seek damages for alleged wrongs, for example, is not enough to keep an action from being a matter of public concern. *See Auriemma,* 910 F.2d at 1460. In this case, however, because DeBraska's statements address only the personal effect of the defendants' actions upon Anderer, Anderer's private interest shows that the statements are not a matter of public concern even though the subject may otherwise be of interest to the public. *See Gustafson,* 290 F.3d at 908 (citations omitted).

Accordingly,

IT IS ORDERED that the defendants' motion for summary judgment be and the same is hereby **GRANTED**;

IT IS FURTHER ORDERED that the action be and the same is hereby **DISMISSED** with prejudice.

The clerk is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this 30th day of September, 2002.

BY THE COURT:

/s/ J. P. Stadtmueller
J. P. Stadtmueller
U.S. District Judge

BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF MILWAUKEE

In The Matter Of The Appeal Of

Police Officer Joseph Anderer, Jr. from MPD Personnel Order Numbers 2001-321, 2001-322 & 2001-323

DECISION OF BOARD ON MOTION TO HEAR AND RULE ON PENDING § 1983 CONSTITUTIONAL CLAIMS

The Board of Fire and Police Commissioners met on Thursday, October 18, 2001, pursuant to Commission Rule XV, section 8, regarding an appeal of our Hearing Examiner's decision on a pretrial motion in the above captioned matter. That motion, brought by Attorney Jonathan Cermele on behalf of Mr. Anderer, asked this Board to hear and decide all § 1983 constitutional claims which are currently the subject of an action involving Mr. Anderer now pending in the United States District Court for the Eastern District of Wisconsin. Our Hearing Examiner, in a ruling dated October 5, 2001, denied that motion.

After full review of the record as relates to that motion, the Board of Fire and Police Commissioners unanimously sustained the action of the Hearing Examiner, thereby upholding the denial of the motion brought by Attorney Cermele on behalf of Mr. Anderer. It is the ruling of this Board that the Motion of Appellant Anderer be, and is hereby, **denied**.

Signed and dated at Milwaukee, Wisconsin, this 24th day of October, 2001.

Board of Fire and Police Commissioners Of The City of Milwaukee

By:

/s/ Robert J. Welch
Robert J. Welch, Chairman

Supreme Court, U.S.
FILED
OCT 17 2005
OFFICE OF THE CLERK

No. 05-367

In The

Supreme Court of the United States

JOSEPH R. ANDERER, JR.,

Petitioner,

v.

POLICE CHIEF ARTHUR JONES, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CONSTITUTION

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STATEMENT OF FACTS

The Court should refer to the summary of facts stated at pages 2 through 7 of the majority opinion. (App. 2-7). Those are the only relevant facts because they are limited to what the investigating officers learned prior to the Anderer arrest. (App. 2, n. 1). The petition's and the dissent's onslaught of irrelevant facts will be addressed in the discussion of the Second Question presented.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither the decision below nor the record raises the first Question Presented in the petition.

The first Question Presented is whether a criminal suspect's refusal to answer investigators' questions in a criminal investigation can be used to elevate reasonable suspicion to probable cause. The Seventh Circuit, however, did not address that question in this proceeding. Moreover, the facts in the record will not support a determination of that question by this Court.

Anderer did not raise this issue in his pleadings, or otherwise, in the district court, nor did he raise it in his brief or arguments to the Seventh Circuit. (App. 10, n. 8). The question was first raised by Judge Coffey in his dissent to the panel's October 6, 2004 opinion, and was then taken up by Anderer in his rehearing petition and in this petition. This belatedly raised issue was addressed by the Seventh Circuit in a footnote responding to the dissent and in an order deleting and restating one sentence in the opinion. The footnote and the order amending the opinion clarified that the Seventh Circuit, in upholding the district

court's probable cause finding, did not take into account Anderer's refusal to give a formal statement to Internal Affairs Department (IAD) investigators, but did consider non-compelled statements he made to a sergeant at the district station and to an IAD investigator. Taking into account those two non-compelled statements in making a probable cause analysis does not implicate Fifth Amendment prohibitions, because Fifth Amendment protection extends to compelled statements only. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 124 S.Ct. 2452, 2460 (2004).

The argument in the petition, as well as the dissenting opinion upon which it is based, do not distinguish among the three incidents involving Anderer's conduct upon arrival at the police district station. In fact, arguments in the petition and the dissent erroneously treat each incident as if it involved compelled testimony. The first two incidents had nothing to do with Anderer's refusal to give a formal statement to IAD investigators, which is the focus of this petition. Only the third incident concerned Anderer's refusal to give a formal statement to IAD investigators. The Seventh Circuit did not take that incident into account in making its probable cause finding.

The first incident occurred before Anderer was detained and before the lieutenant in charge of the district station reported the matter to IAD. A police sergeant heard JR tell the lieutenant that Anderer had hit him in the face. The sergeant then asked Anderer how JR had received a bloody nose, to which Anderer replied, "How would I know . . . I just transported him." (App. 2). The second incident occurred when Anderer, "off the record," asked an IAD investigator, "What did he say I hit him with?" When Anderer was told that JR said he had

punched him in the face, Anderer stated he was a 200-pound man and if he had punched JR in the face, the blow would have left bruises. (App. 4-5). The third incident occurred when IAD investigators asked him to give a formal statement. Anderer refused to give a statement to the investigators without his union representation present. (App. 4).

Anderer and the dissent argue that probable cause did not exist to believe Anderer had committed a crime but for the fact that the arresting officers drew an impermissible inference from Anderer's refusal to give a formal statement to the investigators. But the Seventh Circuit, in holding that there was probable cause to arrest Anderer, did not take into account Anderer's failure to answer questions put to him by criminal investigators.

In its October 6, 2004, slip opinion, the Seventh Circuit stated:

> Given these circumstances – a 12-year-old's injuries and bloody appearance, his consistency in reporting how he had been injured, and Anderer's *total* failure to provide any explanation for the injuries when no other officer observed JR in that condition prior to turning him over to Anderer's sole custody – we believe the Milwaukee police officers had probable cause to believe that Anderer had intentionally or recklessly caused JR's bodily injury. *See* Wis. Stat. § 948.03. [Emphasis supplied and footnote omitted].

(App. 10). In its order of June 21, 2005, denying the appellant's petition for rehearing and rehearing en banc, the Seventh Circuit amended its October 6, 2004, opinion by deleting the above sentence and replacing it with the following:

> Given these circumstances – a 12-year-old's injuries and bloody appearance and injuries consistent with being hit in the mouth, his consistency in reporting how he had been injured, and that no other officer observed JR in that condition prior to turning him over to Anderer's sole custody – we believe the Milwaukee police officers had probable cause to believe that Anderer had intentionally or recklessly caused JR's bodily injury. *See* Wis. Stat. § 948.03. [Footnote omitted].

(App. 95-96).

By deleting the phrase "Anderer's *total* failure to provide any explanation for the injuries" (emphasis supplied), the Seventh Circuit clarified that in finding that probable cause existed, it did not take into account Anderer's failure to give a formal statement to the criminal investigators. The Seventh Circuit's probable cause finding, therefore, was based on the following facts:

> In Wisconsin, a person physically abuses a child when he intentionally or recklessly "causes bodily harm to a child." Wis. Stat. § 948.03. Here, JR arrived at the police station in Anderer's sole custody and was bleeding from his nose and mouth with split lower and upper lips, and no police officer observed him in that condition at the time of his arrest or when he was turned over to Anderer's sole custody. JR told several police officers the same story: Anderer had hit him in the face when JR got "smart" with Anderer. *Anderer offered no explanation to the investigating officers for how JR's injuries might otherwise have occurred, and appears only to have inquired about*

> *what JR claimed Anderer had hit him with.* [Emphasis supplied].

(App. 9-10).

By amending its slip opinion to take out the phrase containing the word "total," the Seventh Circuit clarified that in making its probable cause finding, it did not take into account Anderer's refusal to give a formal statement to the criminal investigators, but did consider Anderer's how-should-I-know statement made to the district sergeant before the criminal investigation began and Anderer's incredulous comments about JR's injuries, neither of which explained how JR's injuries might otherwise have occurred. Responding to the dissent, the Seventh Circuit explained this in footnote 8:

> Recall, too, that before Anderer said he did not wish to make a formal statement without union representation – the focus of the dissent's argument on this point – Anderer made several voluntary comments to other officers, including that he did not know how JR received the bloody nose. (Comp. ¶ 34; Anderer Aff. ¶¶ 60, 75, 79-81.)

(App. 10, n. 8).

The issue before this Court, therefore, were it to accept the petition, is not the first Question Presented, but rather whether the appearance of *any* reference to Anderer's failure to explain JR's injuries in the probable cause analysis impinges on Anderer's Fifth Amendment rights. (App. 10, n. 8). But this is not a new. novel, or undecided question. The Fifth Amendment prohibits only compelled incriminating testimony. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 124 S.Ct. 2452, 2460 (2004).

Anderer's how-should-I-know statement to the district sergeant and his what-did-he-say-I-hit-him-with statement to the IAD investigator were not compelled statements. Consideration of those non-compelled statements in the probable causes analysis does not violate the Fifth Amendment. Anderer neither cites evidence that those statements were compelled nor argues that they were compelled. In fact, Anderer did not even raise the issue either in the district court or in his appeal. ("Anderer himself makes no such argument and, in fact concedes his inability to explain JR's injuries.") (App. 10, n. 8). Instead, Anderer now seeks further review by adopting the argument of the dissent, which fails to distinguish those two non-compelled statements from Anderer's refusal to give a formal statement, and ignores the fact that the Seventh Circuit has made that very distinction in its opinion. (App. 10, n. 8).

Finally, the first question assumes probable cause did not exist without taking into account either Anderer's refusal to answer, or Anderer's refusal along with his two statements. (The petition is unclear on this point.) Anderer argues that consideration of Anderer's refusal and statements, or refusal alone, elevated reasonable suspicion to probable cause. Either premise, however, is not supported by the record because, as explained below, probable cause existed even if Anderer's refusal and statements are not taken into account.

2. Neither the decision below nor the record raises the second Question Presented in the petition.

The second Question Presented is whether the statement of an unreliable witness alone is sufficient to

establish probable cause. That question also does not present a new, novel, or undecided issue to this Court. It is well established that the statement of an unreliable witness alone is not sufficient to establish probable cause. Probable cause exists if, at the time of the arrest, "'facts and circumstances within [the arresting officer's] knowledge and of which she has reasonably trustworthy information would warrant a prudent person in believing that suspect has committed or was committing an offence.'" *Spiegel v. Cortese*, 196 F.3d 717, 723 (7th Cir. 2000) (quoting *Qian v. Kautz*, 168 F.3d 949, 953 (7th Cir. 1999)). The Seventh Circuit correctly stated the law governing probable cause determinations on pages 7 and 8 of its opinion. (App. 7-8). Anderer's gripe (as well as the dissent's) is not that the wrong rule of law was applied by the panel, but that Anderer (and the dissent) disagree with the majority's conclusion.

Anderer maintains that without considering Anderer's refusal and statements, only reasonable suspicion exists, not probable cause. But the facts in the record do not support Anderer's premise. Excluding Anderer's refusal and statements, the following facts had been established by the investigators prior to Anderer's arrest: JR was twelve years old; JR was not injured at the time he was turned over to Officer Anderer to be conveyed to the district station in Anderer's squad; JR was in Anderer's custody exclusively while conveyed to the police station; JR was handcuffed in the back of Anderer's squad when he was conveyed to the police station; when he arrived at the police station, JR had injuries consistent with being hit in the mouth; JR identified Anderer as the officer who had hit him in the mouth; and Anderer did not report use of

force involving JR, any incident involving JR, or any injury to JR. (App. 8).

Both the district court, in granting the summary judgment motion, and the Seventh Circuit, in reviewing the summary judgment motion de novo, found JR to be a credible witness. The district court rejected Anderer's argument that JR was an unreliable witness because "the surrounding circumstances, including blood on JR's face and shirt and the time in which JR was alone with Anderer in Anderer's squad car, would have given a prudent police officer probable cause to arrest Anderer." In other words, JR's statement was corroborated by the surrounding circumstances. (App. 120). The Seventh Circuit rejected Anderer's attack on JR's credibility. The court pointed out that JR had told several officers the same story, that the allegations JR had made against Officer Cook earlier in the evening were reported by JR himself to the investigating officers, and that JR explained that it was the repetition of those statements that prompted Anderer to strike him. (App. 9-11). None of the other officers interviewed (including Shoman) could refute JR's allegation. (App. 12). An interview of the identification technicians would have yielded nothing that the investigating officers did not themselves observe. (App. 12-13). The court rejected the remainder of Anderer's arguments because they were based on events and interviews that occurred after the arrest. (App. 13-14).

The Seventh Circuit also pointed out the fact that JR had not taken medication does not *ipso facto* negate JR's credibility or require further investigation. (App. 10-11). JR's medical history was not known until more than six months after Anderer's arrest when Anderer obtained JR's medical records in another proceeding and tried to use

them as evidence in this case. Even then, the district court barred Anderer from using JR's medical records because Anderer had not obtained them in compliance with the federal rules. (Pet. 10-11; Record 47, 57). The district court's ruling excluding the medical records, however, did not dissuade Anderer and the dissent from relying on them to support their argument and opinion. (Pet. 19, App. 72, 105).

Anderer now asks this court to give him yet another opportunity to argue the summary judgment motion, and asks this Court to consider after-arrest-acquired facts to determine whether JR had been a reliable witness. This request, while not stated as a question presented, is apparent from the content of Anderer's statement of facts and argument. Many of the facts Anderer relies upon are drawn from Judge Coffey's dissent. In his dissent, however, Judge Coffey relies upon after-arrest-acquired facts from the statements and summary judgment affidavits of Police Officers Anderer, Cook, Logan, Centeno, Bolen, Brown, Kathrein, and civilian witnesses; and from JR's medical records, which were acquired by Anderer in the course of the litigation. Those officers and witnesses did not make those statements to the investigators prior to Anderer's arrest, nor did they inform the investigators prior to the arrest of the facts contained in their later statements. Cook and Logan refused to give statements to investigators prior to the arrest. Centeno and Bolen were not interviewed. Brown and Kathrein, identification technicians, took pictures of JR's injuries the night of the arrest, but made no statements to the investigators at that time. The civilian witnesses were interviewed after Anderer's arrest. Accordingly, these after-arrest-acquired statements and affidavits are irrelevant to the issue of

what the investigating officers knew prior to the arrest. (App. 11, n. 9).

The Seventh Circuit noted that it was puzzled by Judge Coffey's discussion of irrelevant after-arrest-acquired facts, including later-acquired knowledge about JR's medical history, the district attorney's later decision not to charge Anderer, subsequent investigations of Anderer's arrest, statements and affidavits given after Anderer's arrest containing information that was not made known to arresting officers, photographs of JR that were developed after the arrest, and statements made by identifications technicians after the arrest. (App. 11, n. 9). The Seventh Circuit's puzzlement perhaps was caused by the dissent citing after-arrest acquired facts in support of its opinion, but at the same time making no argument that the well-established rule that "[t]he existence of probable cause turns on the information known to the officer at the moment the arrest is made, not of subsequently-received information," *Spiegel v. Cortese*, 196 F.3d 717, 723 (7th Cir. 2000), should be changed to allow consideration of after-acquired facts to determine whether an accusatory witness had been reliable.

The premise of Anderer's and the dissent's probable cause argument is that before a police officer may decide whether probable cause exists, the investigating officers must interview every witness, pursue every lead, gather every record, and consult with any expert who might shed light on the suspect's behavior. But their premise is not supported by the well-established law of probable cause and, if adopted, would delay the arrest of suspects until the completion of criminal investigations and thereby

unnecessarily increase the danger to the public generally, and to crime victims and witnesses particularly.

CONCLUSION

The petition should be denied.

Respectfully submitted on the 17th day of October, 2005.

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